

16B Am. Jur. 2d Constitutional Law § 945

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 945. What procedural process is due, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867

Procedural due process is a guarantee of fair procedure.¹ While due process of law, in its procedural aspect, has never been a term of fixed and invariable content,² the essential elements of procedural due process of law are notice and the opportunity to be heard prior to depriving a person of his or her protected property interest.³ Thus, procedural due process makes it necessary that where one may be deprived of such a right, the person must be given notice of the proceedings against him or her;⁴ the person must be given an opportunity to defend himself or herself, that is, a hearing,⁵ before an impartial tribunal having jurisdiction of the cause;⁶ and the problem of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness.⁷ The determination of the appropriate form of procedural protection required under the Due Process Clause requires an evaluation of all the circumstances and an accommodation of competing interests, in which an individual's right to fairness must be respected, as must a court's need to act quickly and decisively.⁸

The Due Process Clause calls for two separate inquiries in evaluating an alleged procedural due-process violation: has the plaintiff lost something that fits into one of the three protected categories of life, liberty, or property; and, if so, has the plaintiff received the minimum measure of procedural protection warranted under the circumstances.⁹ As otherwise stated, the standard analysis under the Due Process Clause proceeds in two steps: (1) the court first asks whether there exists a liberty or property interest of which a person has been deprived, and (2) if so, it asks whether the procedures followed by the State were constitutionally sufficient.¹⁰ Interests comprehended within the meaning of either "liberty" or "property" for these purposes

include interests that are recognized and protected by state law and interests guaranteed in one of the provisions of the Bill of Rights which have been incorporated into the 14th Amendment.¹¹ A violation of procedural due process may occur even where the damages are only nominal.¹² In fact, for purposes of procedural due process, a damage remedy is not an essential component of constitutionally adequate review procedures.¹³

The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one will be personally bound until he or she has had a day in court by which is meant until he or she has been duly cited to appear and has been afforded an opportunity to be heard.¹⁴ Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered.¹⁵

Although the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.¹⁶ Further, an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the 14th Amendment if a meaningful postdeprivation remedy for the loss is available.¹⁷

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Footnotes

- 1 [Cotnoir v. University of Maine Systems](#), 35 F.3d 6, 94 Ed. Law Rep. 104 (1st Cir. 1994); [Wolf v. Fauquier County Bd. of Supervisors](#), 555 F.3d 311 (4th Cir. 2009); [L.A. Ray Realty v. Town Council of Town of Cumberland](#), 698 A.2d 202 (R.I. 1997).
- 2 [Federal Communications Commission v. WJR, The Goodwill Station](#), 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).
As to due process as flexible and calling for such procedural protections as the particular situation demands, see § 939.
- 3 [Wolf v. Fauquier County Bd. of Supervisors](#), 555 F.3d 311 (4th Cir. 2009); [Ardito v. City of Providence](#), 263 F. Supp. 2d 358 (D.R.I. 2003); [Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461](#), 924 N.W.2d 594 (Minn. 2019); [Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee](#), 2014-NMSC-006, 319 P.3d 639 (N.M. 2014); [Nassau County Sheriff's Correction Officers Benevolent Ass'n, Inc. v. Nassau County](#), 137 A.D.3d 1145, 28 N.Y.S.3d 377 (2d Dep't 2016); [OSI Restaurant Partners, LLC v. Oscoda Plastics, Inc.](#), 831 S.E.2d 386 (N.C. Ct. App. 2019).
Sometimes, nothing more is required by due process before the government deprives a person of property than notice and the opportunity to be heard as to why the proposed action should or should not be taken. [Gill v. N.J. Dept. of Banking and Ins.](#), 404 N.J. Super. 1, 960 A.2d 397 (App. Div. 2008).
- 4 §§ 973 to 986.
- 5 §§ 987 to 1017.
- 6 §§ 1009 to 1015.
- 7 [Hannah v. Larche](#), 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960) (holding that due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings); [Vernon v. State](#), 245 Ala. 633, 18 So. 2d 388 (1944); [In re Cole C.](#), 174 Cal. App. 4th 900, 95 Cal. Rptr. 3d 62 (4th Dist. 2009); [Helfrick v. Dahlstrom Metallic Door Co.](#), 256 N.Y. 199, 176 N.E. 141 (1931), judgment aff'd, 284 U.S. 594, 52 S. Ct. 202, 76 L. Ed. 511 (1932).
Even if government action depriving a person of life, liberty, or property survives a substantive due-process scrutiny, "procedural" due process requires that such government action be implemented in a fair manner. [U.S. v. Salerno](#), 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
- 8 [Rogal v. American Broadcasting Companies, Inc.](#), 74 F.3d 40, 34 Fed. R. Serv. 3d 388 (3d Cir. 1996).
- 9 [Brown v. Hot, Sexy and Safer Productions, Inc.](#), 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995); [Mallette v. Arlington County Employees' Supplemental Retirement System II](#), 91 F.3d 630 (4th Cir. 1996); [Humphries](#)

v. County of Los Angeles, 554 F.3d 1170 (9th Cir. 2009), as amended, (Jan. 30, 2009) and rev'd and remanded on other grounds, 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010); *Farthing v. City of Shawnee, Kan.*, 39 F.3d 1131 (10th Cir. 1994).

To succeed on a claim of procedural due-process deprivation, that is, a lack of notice and opportunity to be heard, a plaintiff must establish that some state action deprived him or her of a protected property interest. *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985 (2d Cir. 1997).

10 *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011); *Victory v. Pataki*, 814 F.3d 47 (2d Cir. 2016), for additional opinion, see, 632 Fed. Appx. 41 (2d Cir. 2016) and as amended, (Feb. 24, 2016); *Dufur v. U.S. Parole Commission*, 314 F. Supp. 3d 10 (D.D.C. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019); *Pimentel v. City of Methuen*, 323 F. Supp. 3d 255 (D. Mass. 2018).

11 *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (finding that the statute which creates a right of action against a person who, under color of state law, subjects another to the deprivation of any right secured by the United States Constitution makes a deprivation of such latter type of right actionable independently of state law; construing 42 U.S.C.A. § 1983).

12 *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997).

13 *Licari v. Ferruzzi*, 22 F.3d 344, 28 Fed. R. Serv. 3d 1472 (1st Cir. 1994).

14 *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).

15 *Powell v. State of Ala.*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); *Frahn v. Greyling Realization Corporation*, 239 Ala. 580, 195 So. 758 (1940); *Rediker v. Rediker*, 35 Cal. 2d 796, 221 P.2d 1, 20 A.L.R.2d 1152 (1950); *City of Coral Gables v. Certain Lands Upon Which Taxes Are Delinquent*, 110 Fla. 189, 149 So. 36 (1933); *Wichita Council No. 120 of Security Ben. Ass'n v. Security Ben. Ass'n*, 138 Kan. 841, 28 P.2d 976, 94 A.L.R. 629 (1934); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638, 87 A.L.R. 237 (1933); *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937).

16 § 963.

17 *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

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16B Am. Jur. 2d Constitutional Law § 946

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 946. Effect of past practices on procedural protections afforded by due-process guarantee

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867

Ultimately, federal law prescribes the nature and extent of the procedural protections afforded by the United States Constitution.¹ It is certainly true, however, that if the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a federal court will interfere on the ground that there has been a failure of due process.²

Procedural due-process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.³ Due process is primarily that kind of procedure which is suitable and proper to the nature of the case and sanctioned by established customs and usages.⁴ It is not necessary that procedure conform to past usage, however, and new methods may be adopted or provided so long as they are in harmony with the underlying principles of the constitutional guarantee.⁵ Any legal proceeding sanctioned by age and custom, or newly devised in the discretion of the legislative power for the furtherance of the general public good, which regards and preserves the fundamental rights of property and justice constitutes due process of law.⁶

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Footnotes

- 1 [Watson v. City of New York](#), 92 F.3d 31 (2d Cir. 1996).
- 2 [Jordan v. Com. of Massachusetts](#), 225 U.S. 167, 32 S. Ct. 651, 56 L. Ed. 1038 (1912).
- There is a failure of due process only in those cases where it cannot be said that the procedure adopted fairly
insured the protection of the interest of absent parties who are to be bound by it. [Hansberry v. Lee](#), 311 U.S.
32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).
- 3 § 952.
- 4 [Sherer v. City of Laguna Beach](#), 13 Cal. App. 2d 396, 57 P.2d 157 (4th Dist. 1936); [Vogel v. Corporation](#)
[Commission of Oklahoma](#), 1942 OK 14, 190 Okla. 156, 121 P.2d 586 (1942).
- 5 [People v. Troche](#), 206 Cal. 35, 273 P. 767 (1928) (overruled in part on other grounds by, [People v. Wells](#),
33 Cal. 2d 330, 202 P.2d 53 (1949)).
- In comparison with other constitutional claims such as equal protection or free exercise, a cognizable
procedural due-process claim does not typically arise until proceedings are at a mature stage and due process
has not been furnished even though some tangible deprivation has occurred. [Sherwin Manor Nursing Center,](#)
[Inc. v. McAuliffe](#), 37 F.3d 1216 (7th Cir. 1994).
- 6 [People v. Hickman](#), 204 Cal. 470, 268 P. 909 (1928).

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16B Am. Jur. 2d Constitutional Law § 947

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 947. Factors considered and tests applied in determining whether procedural due-process requirements satisfied

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867, 3875

The requirements of due process frequently vary with the type of proceeding involved.¹ Procedural due process in the administrative setting, for instance, does not always require application of the judicial model.² Due process is flexible and calls for such procedural protections as the particular situation demands,³ and the quantum and quality of the process due in a particular situation depends on the need to serve the due-process function of minimizing the risk of error in decision making.⁴

Procedural due-process claims require a two-part analysis: (1) whether the plaintiff has a liberty or property interest that is entitled to procedural due-process protection, and (2) if so, what process is due.⁵ In asserting a procedural due-process violation, therefore, a plaintiff must first demonstrate that he or she has a protected property or liberty interest.⁶ The analysis of a procedural due-process claim must thus begin with an examination of the interest allegedly violated.⁷

To determine what process is constitutionally due, the courts generally have balanced three distinct factors: (1) the private interest that will be affected by official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest,⁸ including the fiscal and administrative burdens that any additional or substitute procedures would entail.⁹ In at least one jurisdiction, consideration is also given to the dignitary interest in informing individuals of the nature, grounds, and consequences of the

action and in enabling them to present their side of the story before a responsible government official.¹⁰ Thus, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.¹¹

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Footnotes

- 1 [Hannah v. Larche](#), 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).
Constitutional procedural safeguards in the juvenile context find their genesis in the Due Process Clause of the 14th Amendment. [State v. D.H.](#), 120 Ohio St. 3d 540, 2009-Ohio-9, 901 N.E.2d 209 (2009).
- 2 [Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977).
As to procedural due process in administrative proceedings, generally, see [Am. Jur. 2d, Administrative Law](#) §§ 53, 117.
- 3 § 939.
- 4 [Gilbert v. Homar](#), 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); [Mallette v. Arlington County Employees' Supplemental Retirement System II](#), 91 F.3d 630 (4th Cir. 1996).
- 5 [Brown v. Hot, Sexy and Safer Productions, Inc.](#), 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995); [Joelson v. U.S.](#), 86 F.3d 1413, 1996 FED App. 0178P (6th Cir. 1996); [Hamlin v. Vaudenberg](#), 95 F.3d 580 (7th Cir. 1996); [Watson v. University of Utah Medical Center](#), 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996); [Branham v. May](#), 428 F. Supp. 2d 668, 210 Ed. Law Rep. 173 (E.D. Ky. 2006); [Bluitt v. Houston Independent School Dist.](#), 236 F. Supp. 2d 703 (S.D. Tex. 2002).
- 6 [Davenport v. University of Arkansas Bd. of Trustees](#), 553 F.3d 1110 (8th Cir. 2009); [Watson v. University of Utah Medical Center](#), 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996); [Rivera v. Fagundo](#), 301 F. Supp. 2d 103 (D.P.R. 2004), *aff'd*, 414 F.3d 124 (1st Cir. 2005); [Hines v. Fabian](#), 764 N.W.2d 849 (Minn. Ct. App. 2009); [Beasley v. Flathead County](#), 2009 MT 121, 350 Mont. 177, 206 P.3d 915 (2009).
In assessing a procedural due-process claim unless there has been a deprivation of a protected liberty or property interest by state action, the question of what process is required is irrelevant for the constitutional right to due process is simply not implicated. [Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson](#), 566 F.3d 138, 244 Ed. Law Rep. 549 (4th Cir. 2009).
- 7 [Dover Elevator Co. v. Arkansas State University](#), 64 F.3d 442, 103 Ed. Law Rep. 49 (8th Cir. 1995).
- 8 [Nelson v. Colorado](#), 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017); [Wilkinson v. Austin](#), 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); [Reams v. Irvin](#), 561 F.3d 1258 (11th Cir. 2009); [Atherton v. District of Columbia Office of Mayor](#), 567 F.3d 672 (D.C. Cir. 2009); [Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors](#), 205 P.3d 326 (Alaska 2009); [In re William M.W.](#), 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019); [In re Jayce O.](#), 323 Conn. 690, 150 A.3d 640 (2016); [School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.](#), 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009); [State v. Russell](#), 897 N.W.2d 717 (Iowa 2017); [Interest of J.L.](#), 57 Kan. App. 2d 60, 449 P.3d 762 (2019); [Costa v. Fall River Housing Authority](#), 453 Mass. 614, 903 N.E.2d 1098 (2009); [In re Adoption of N.F.](#), 2019-Ohio-5380, 2019 WL 7290484 (Ohio Ct. App. 3d Dist. Logan County 2019); [City of Philadelphia v. Shih Tai Pien](#), 224 A.3d 71 (Pa. Commw. Ct. 2019); [Interest of T.B.](#), 594 S.W.3d 773 (Tex. App. Waco 2019); [Stone v. Town of Irasburg](#), 196 Vt. 356, 2014 VT 43, 98 A.3d 769 (2014); [In re Lain](#), 179 Wash. 2d 1, 315 P.3d 455 (2013).
- 9 [Wilkinson v. Austin](#), 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); [In re William M.W.](#), 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019); [In re Jayce O.](#), 323 Conn. 690, 150 A.3d 640 (2016); [Interest of J.L.](#), 57 Kan. App. 2d 60, 449 P.3d 762 (2019); [City of Philadelphia v. Shih Tai Pien](#), 224 A.3d 71 (Pa. Commw. Ct. 2019); [Interest of T.B.](#), 594 S.W.3d 773 (Tex. App. Waco 2019); [Stone v. Town of Irasburg](#), 196 Vt. 356, 2014 VT 43, 98 A.3d 769 (2014); [In re Lain](#), 179 Wash. 2d 1, 315 P.3d 455 (2013).
- 10 [In re William M.W.](#), 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019).
- 11 [Fusari v. Steinberg](#), 419 U.S. 379, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975); [Pannell v. Jones](#), 36 N.Y.2d 339, 368 N.Y.S.2d 467, 329 N.E.2d 159 (1975).

When the Due Process Clause is invoked in a novel context, a court must begin its inquiry with a determination of the precise nature of the private interest that is threatened by the state, and only after that interest has been identified can the court properly evaluate the adequacy of the state's process. [Lehr v. Robertson](#), 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

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16B Am. Jur. 2d Constitutional Law § 948

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 948. Fundamental requirements of procedural due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867 to 3879

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[Application of Stigma-Plus Due Process Claims to Education Context](#), 41 A.L.R.6th 391

The core of due process is the right to notice and a meaningful opportunity to be heard.¹ More specifically, the fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.² Exceptions to the principle that a person must be afforded notice and an opportunity for a hearing before he or she is deprived of his or her rights can be justified only in extraordinary circumstances.³ Thus, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest.⁴

Reminder:

The standard analysis under the Due Process Clause proceeds in two steps: (1) the court first asks whether there exists a liberty or property interest of which a person has been deprived, and (2) if so, it asks whether the procedures followed by the State were constitutionally sufficient.⁵

Whether the United States Constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors such as the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding.⁶ Due process is required only when a decision of the state implicates an interest within the protection of the 14th Amendment, and to determine whether due-process requirements apply in the first place, the court must look not to the weight but to the nature of the interest at stake.⁷

Observation:

To have a constitutionally protected interest sufficient to be entitled to due process, the plaintiff must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from some independent source such as state law.⁸ Thus, a person clearly must have more than an abstract need for a protectable right and more than a unilateral expectation of it; instead, he or she must have a legitimate claim of entitlement to it.⁹

Before the United States Supreme Court invokes the Constitution to impose a due-process procedural requirement, it should be reasonably certain that the effect will be to afford protection appropriate to the constitutional interests at stake.¹⁰ Both the degree of potential deprivation of a benefit or interest that may be created by a particular decision and the possible length of wrongful deprivation are factors to be considered in assessing the validity of any governmental decision-making process for purposes of due process.¹¹ Moreover, in order to fully assess the reliability and fairness of a system of a governmental procedure governing the termination of benefits for purposes of its compliance with due process, consideration must be given not only to the reversal rate for appealed cases but also to the overall rate of error for all denials of benefits.¹²

On the other hand, although the United States Supreme Court eschews rigid or formalistic limitations on the protection of procedural due process, it nevertheless observes certain boundaries for the words "liberty" and "property" in the Due Process Clause of the 14th Amendment must be given some meaning.¹³ The Due Process Clause of the 14th Amendment requires that state action not transgress those fundamental notions upon which all our civil and political institutions are based.¹⁴

Observation:

The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right is the prevention of arbitrary use of government power. Procedural due-process claims do not implicate the egregiousness of the action itself but only question whether the process accorded prior to the deprivation has been constitutionally sufficient. Although the existence of a protected right must be the threshold determination, the focus of the inquiry centers on the process provided rather than on the nature of the right.¹⁵

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Footnotes

- 1 [LaChance v. Erickson](#), 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998).
Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before a governmental deprivation of a property interest. [Ito v. Investors Equity Life Holding Co.](#), 135 Haw. 49, 346 P.3d 118 (2015).
- 2 [Richards v. Jefferson County, Ala.](#), 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); [Sheffey v. Futch](#), 250 So. 2d 907 (Fla. 4th DCA 1971); [State v. Harkins](#), 786 N.W.2d 498 (Iowa Ct. App. 2009); [Gams v. Houghton](#), 884 N.W.2d 611 (Minn. 2016); [Rumora v. Board of Ed. of Ashtabula Area City School Dist.](#), 32 Ohio Misc. 165, 61 Ohio Op. 2d 289, 290 N.E.2d 195 (C.P. 1972); [City of South Milwaukee v. Kester](#), 2013 WI App 50, 347 Wis. 2d 334, 830 N.W.2d 710 (Ct. App. 2013).
- 3 [Randone v. Appellate Department](#), 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971) (ruling that a creditor's private interest is never sufficient to justify attachment of his alleged debtor's necessities of life before notice and a hearing on the validity of the creditor's claim even where there is a likelihood that the alleged debtor may abscond or conceal assets).
Temporary or partial impairments to property rights entailed by attachments, liens, and similar encumbrances are sufficient to merit due-process protection even though they do not amount to any complete, physical, or permanent deprivation of real property. [Connecticut v. Doeher](#), 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).
However, homeowners were not deprived of their property rights without due process by attachment of their homes by a home repair contractor pursuant to Connecticut's prejudgment attachment statute which did not require a predeprivation hearing or the posting of a security bond. [Shaumyan v. O'Neill](#), 987 F.2d 122 (2d Cir. 1993).
As to instances when notice is not required, see §§ 985, 986.
As to proceedings in which a hearing is not required, see §§ 995, 996.
- 4 [U.S. v. James Daniel Good Real Property](#), 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); [James Madison Ltd. by Hecht v. Ludwig](#), 82 F.3d 1085 (D.C. Cir. 1996).
- 5 § 945.
- 6 [Hannah v. Larche](#), 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).
The process due at any given time must reflect the nature of the proceeding and the interests involved. [KC v. State](#), 2015 WY 73, 351 P.3d 236 (Wyo. 2015).

- 7 [Greenholtz v. Inmates of Nebraska Penal and Correctional Complex](#), 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); [State v. Small](#), 162 Ohio App. 3d 375, 2005-Ohio-3813, 833 N.E.2d 774 (10th Dist. Franklin County 2005), cause dismissed, 106 Ohio St. 3d 1476, 2005-Ohio-4054, 832 N.E.2d 731 (2005).
The requirements of procedural due process are applicable where a state attaches a badge of infamy to a citizen. [Wisconsin v. Constantineau](#), 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).
A driver's license is an important interest entitled to the protection of procedural due process of law. [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); [State v. Perry](#), 96 Wash. App. 1, 975 P.2d 6 (Div. 1 1999).
- 8 [Davila-Lopes v. Zapata](#), 111 F.3d 192 (1st Cir. 1997).
- 9 [Greenholtz v. Inmates of Nebraska Penal and Correctional Complex](#), 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); [Hill v. Jackson](#), 64 F.3d 163 (4th Cir. 1995); [Potts v. Davis County](#), 551 F.3d 1188 (10th Cir. 2009); [Stewart v. Gaines](#), 370 F. Supp. 2d 293 (D.D.C. 2005); [Cleveland Constr., Inc. v. Cincinnati](#), 118 Ohio St. 3d 283, 2008-Ohio-2337, 888 N.E.2d 1068 (2008).
- 10 [Ingraham v. Wright](#), 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
- 11 [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); [Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia](#), 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).
In determining what process is due, an account must be taken of the length and finality of the deprivation. [Gilbert v. Homar](#), 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
The duration of any potentially wrongful deprivation of a property interest under a state's procedures is an important factor in assessing the impact of official action on the private interest involved for purposes of determining the process due under the Due Process Clause of the 14th Amendment. [Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).
- 12 [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
- 13 [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
- 14 [Weaver v. Brenner](#), 40 F.3d 527 (2d Cir. 1994).
- 15 [Howard v. Grinage](#), 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).

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16B Am. Jur. 2d Constitutional Law § 949

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 949. What is not required for procedural due process, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867, 3912

Procedural due process, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. Instead, it simply requires that the government provide due process before making such a decision.¹ Procedural due process does not require perfection at every stage of a process,² and, unlike substantive due process, does not require that liability turn upon the culpability of the offending party.³ Moreover, the Due Process Clause does not require a single model of procedural fairness, let alone a particular form of procedure,⁴ and does not require a process that is afforded at the time and in the manner of one's own choosing.⁵

The applicability of procedural due-process rights is not governed by any wooden distinction between "rights" and "privileges,"⁶ nor does it rest on any distinctions as to the "importance" or "necessity" of the property involved.⁷ Furthermore, although the establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication, nevertheless the United States Constitution recognizes higher values than speed and efficiency.⁸ Similarly, financial cost alone is not a controlling weight in determining whether procedural due process requires a particular procedural safeguard prior to some governmental decision, but the government's interest, and hence that of the public, in conserving scarce fiscal and governmental resources is a factor that must be weighed.⁹

At some point, the benefit of an additional safeguard to the individual affected and to society, in terms of increased assurance that the action is just, may be outweighed by the cost.¹⁰ The range of interests protected by procedural due process is not infinite.¹¹ Thus, although determination of whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss,¹² not every grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause of the 14th Amendment.¹³

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Footnotes

- 1 [Howard v. Grinage](#), 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).
- 2 [Saucon Valley Manor, Inc. v. Miller](#), 392 F. Supp. 3d 554 (E.D. Pa. 2019).
- 3 [Sharp v. Becerra](#), 393 F. Supp. 3d 991 (E.D. Cal. 2019).
- 4 [Retfalvi v. United States](#), 335 F. Supp. 3d 791 (E.D. N.C. 2018), [aff'd](#), 930 F.3d 600 (4th Cir. 2019).
- 5 [Sterigenics U.S., LLC v. Kim](#), 385 F. Supp. 3d 600 (N.D. Ill. 2019).
- 6 [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
Failure of a state-code provision relating to the filing of an undertaking by a plaintiff in an action against a public entity or a public employee to satisfy due-process requirements cannot be justified under the theory that bringing such an action is a privilege rather than a right and, as such, not subject to due-process requirements. [Beaudreau v. Superior Court](#), 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713 (1975).
- 7 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 8 [U. S. Dept. of Agriculture v. Murry](#), 413 U.S. 508, 93 S. Ct. 2832, 37 L. Ed. 2d 767 (1973); [Lavan v. City of Los Angeles](#), 797 F. Supp. 2d 1005 (C.D. Cal. 2011).
Procedural due process is not intended to promote efficiency or accommodate all possible interests; instead, it is intended to protect the particular interests of the person whose possessions are about to be taken. [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 9 [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard. [Bellevue School Dist. v. E.S.](#), 148 Wash. App. 205, 199 P.3d 1010, 240 Ed. Law Rep. 925 (Div. 1 2009), [rev'd on other grounds](#), 171 Wash. 2d 695, 257 P.3d 570, 269 Ed. Law Rep. 915 (2011).
- 10 [Ingraham v. Wright](#), 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
- 11 [Ingraham v. Wright](#), 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
There is no fundamental due-process right to the continued opportunity to exonerate oneself throughout the natural course of one's life. [U.S. v. Quinones](#), 313 F.3d 49 (2d Cir. 2002).
- 12 [Morrissey v. Brewer](#), 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); [U.S. v. Silver](#), 83 F.3d 289 (9th Cir. 1996).
- 13 [Ingraham v. Wright](#), 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
That a precipitous and perhaps improvident decision to remove a child from his foster family might constitute a grievous loss to the foster family does not, in and of itself, implicate the due-process guarantee of the 14th Amendment as within the "liberty" protected thereby. [Smith v. Organization of Foster Families For Equality and Reform](#), 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
The procedural requirements of the Due Process Clause of the 14th Amendment are not brought into play merely because a government official defames a person. [Paul v. Davis](#), 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

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16B Am. Jur. 2d Constitutional Law § 950

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 950. Notice and hearing not required by procedural due-process guarantee when new legislation passed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867, 3889 to 3891

Before due-process rights attach, a person must show that a deprivation occurred as a result of an adjudicatory process rather than a legislative process.¹ Due process requires a notice and hearing only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation.² From the inception of this nation's legal system, statutes of general application have regularly been enacted without affording each potentially affected individual notice and hearing.³

Observation:

If a matter is one in which all are equally concerned, the matter is a legislative process and due-process rights do not attach.⁴

Footnotes

- 1 [Blocktree Properties, LLC v. Public Utility District No. 2 of Grant County Washington](#), 380 F. Supp. 3d 1102 (E.D. Wash. 2019), *aff'd*, 783 Fed. Appx. 769 (9th Cir. 2019).
Procedural due-process concerns are implicated only by adjudications, not by state actions that are legislative in character. [O'Toole v. Pennsylvania Department of Corrections](#), 196 A.3d 260 (Pa. Commw. Ct. 2018).
- 2 [San Diego Bldg. Contractors Assn. v. City Council](#), 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P.2d 570, 72 A.L.R.3d 973 (1974) (disapproved of on other grounds by, [Horn v. County of Ventura](#), 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979)).
Absent a constitutional or statutory right to a hearing, a party has no right to a hearing before an agency makes a legislative determination. [Legislature of Rockland County v. New York State Public Service Commission](#), 49 A.D.2d 484, 375 N.Y.S.2d 650 (3d Dep't 1975).
The selection of a site for a public improvement is the exercise of power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable. [Stones v. Plattsmouth Airport Authority](#), 193 Neb. 552, 228 N.W.2d 129 (1975).
- 3 [San Diego Bldg. Contractors Assn. v. City Council](#), 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P.2d 570, 72 A.L.R.3d 973 (1974) (disapproved of on other grounds by, [Horn v. County of Ventura](#), 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979)).
- 4 [Blocktree Properties, LLC v. Public Utility District No. 2 of Grant County Washington](#), 380 F. Supp. 3d 1102 (E.D. Wash. 2019), *aff'd*, 783 Fed. Appx. 769 (9th Cir. 2019).

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16B Am. Jur. 2d Constitutional Law § 951

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 951. Particular form of procedure not required by due-process guarantee; state power as to form

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3867

The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure.¹ Due process does not require a state to adopt one procedure over another on the basis that the procedure may produce results more favorable to the party challenging the existing procedures.² Instead, due process requires only that certain safeguards exist in whatever procedural form it is afforded. The Due Process Clause in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided that the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided.³ Thus, for example, the states are afforded great flexibility in satisfying the federal constitutional requirements of due process in the field of taxation, and as long as state law provides a clear and certain remedy, the states may determine whether to provide predeprivation process, such as an injunction, or instead to afford postdeprivation relief, such as a refund.⁴ Also, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened, and in determining whether the Clause requires a right to counsel in such circumstances, a court must take account of opposing interests, as well as consider the probable value of additional or substitute procedural safeguards.⁵

The violation of a state's formal procedure does not in and of itself implicate constitutional due-process concerns.⁶ Even though state law might command faithful adherence to the institution's mandatory rules, and a violation may result in some remedy or

sanction, violating a procedural rule alone does not accomplish the creation of a protectable constitutional interest.⁷ When a state provides a party with a notice and a hearing that comport with due-process standards, the state's failure to follow its own rules is not per se a deprivation of substantive due process.⁸

Observation:

The Due Process Clause of the 14th Amendment does not control mere forms of procedure in the state courts or regulate the practice therein.⁹ The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.¹⁰

Nothing in the United States Constitution prevents a state from providing such a system of courts as it chooses.¹¹ A state does not violate the Due Process Clause of the 14th Amendment by providing alternative or additional procedures beyond what the Federal Constitution requires.¹²

From the foregoing, it follows that due process does not necessarily require judicial process¹³ or trial by jury,¹⁴ and even where a right to a jury trial is granted, there is nothing in the United States Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.¹⁵

Although due process has its roots in the traditions of the common law,¹⁶ it is not to be inferred that all modes of procedure which do not have the sanction of this early law are to be condemned.¹⁷ Furthermore, the Fifth Amendment itself guarantees no particular form of procedure; instead, it protects only substantial rights.¹⁸

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Footnotes

- 1 Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974); Geo S Bush & Co v. U S, 22 Cust. Ct. 158, 135 F. Supp. 696 (Cust. Ct. 1 Div. 1949); People v. Dean, 174 Cal. App. 4th 186, 94 Cal. Rptr. 3d 478 (4th Dist. 2009); In re Santillanes, 1943-NMSC-011, 47 N.M. 140, 138 P.2d 503 (1943); Commission of Investigation of State by Lane v. Lombardozzi, 7 A.D.2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958), order aff'd, 5 N.Y.2d 1026, 185 N.Y.S.2d 550, 158 N.E.2d 250 (1959) and order aff'd, 6 N.Y.2d 744, 186 N.Y.S.2d 272, 158 N.E.2d 847 (1959); McMahan v. S.C. Department of Education-Transportation, 417 S.C. 481, 790 S.E.2d 393 (Ct. App. 2016).
- 2 Heller v. Doe by Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).
- 3 Northeast Sav., F.A. v. Hintlian, 241 Conn. 269, 696 A.2d 315 (1997).
- 4 National Private Truck Council, Inc. v. Oklahoma Tax Com'n, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).
- 5 Turner v. Rogers, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).
- 6 Purisch v. Tennessee Technological University, 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).
- 7 Davila-Lopes v. Zapata, 111 F.3d 192 (1st Cir. 1997).

The mere failure to accord procedural protections called for by state law or regulation does not of itself amount to a denial of due process. *Giovanni v. Lynn*, 48 F.3d 908 (5th Cir. 1995).

Levitt v. University of Texas at El Paso, 759 F.2d 1224, 24 Ed. Law Rep. 711 (5th Cir. 1985).

Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co., 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931); *Dohany v. Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).

The Federal Rules of Criminal Procedure have no application in state courts and cannot be incorporated into the 14th Amendment as a limitation on state action. *People v. Kross*, 112 Cal. App. 2d 602, 247 P.2d 44 (2d Dist. 1952).

The 14th Amendment does not compel state courts or legislatures to adopt any particular rule for establishing conclusiveness of judgments in class suits; there is a denial of due process only in those class suits where it cannot be said that the procedure adopted fairly insured protection of the interests of absent parties who are to be bound by it. *Gant v. City of Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975).

Brown v. State of Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936); *Winkler v. State*, 194 Md. 1, 69 A.2d 674 (1949).

Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927); *State v. Polakow's Realty Experts*, 243 Ala. 441, 10 So. 2d 461 (1942).

Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

Ex parte Williams, 345 Mo. 1121, 139 S.W.2d 485 (1940).

As to the necessity of a judicial tribunal, see § 1010.

Am. Jur. 2d, Jury § 7.

Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. 54, 40 S. Ct. 68, 64 L. Ed. 133 (1919).

§§ 934, 935.

Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956).

N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).

The process afforded by state law is not relevant in determining whether there is a state-created right that triggers due-process protection. *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997).

However, a state law which generates a legitimate claim of entitlement can create an interest, deprivation of which triggers application of the Due Process Clause. *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996), certified question answered on other grounds, 697 A.2d 23 (D.C. 1997).

16B Am. Jur. 2d Constitutional Law § 952

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 952. Highest degree of fairness and wisdom not required by due-process guarantee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑3867

What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries.¹ The very nature of the due-process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case,² but instead, procedural due-process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.³ No particular procedure violates the 14th Amendment merely because another method may seem fairer or wiser.⁴

Accordingly, a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of liberty or justice ranked as fundamental,⁵ such as the requirements of notice and hearing⁶ or unless it is unreasonable or arbitrary.⁷ Thus, the protections of the Due Process Clause are invoked only when state procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest.⁸

Observation:

The Due Process Clause does not use the words "due process" as an equivalent for the process of the federal courts.⁹

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Footnotes

- 1 [Cohen v. Hurley](#), 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) (overruled in part on other grounds by, [Malloy v. Hogan](#), 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)) and (overruled in part on other grounds by, [Spevack v. Klein](#), 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967)).
- 2 [Walters v. National Ass'n of Radiation Survivors](#), 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); [Yarbrough v. Decatur Housing Authority](#), 941 F.3d 1022 (11th Cir. 2019); [Proctor v. McNeil](#), 14 F. Supp. 3d 1108, 310 Ed. Law Rep. 157 (N.D. Ill. 2014); [Potomac Development Corp. v. District of Columbia](#), 28 A.3d 531 (D.C. 2011).
- 3 [Walters v. National Ass'n of Radiation Survivors](#), 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); [Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); [Barkley v. U.S. Marshals Service ex rel. Hylton](#), 766 F.3d 25 (D.C. Cir. 2014); [Community Youth Athletic Center v. City of National City](#), 220 Cal. App. 4th 1385, 164 Cal. Rptr. 3d 644 (4th Dist. 2013); [Pagan v. Carey Wiping Materials Corp.](#), 144 Conn. App. 413, 73 A.3d 784 (2013).
- 4 [Stein v. People of State of New York](#), 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, [Jackson v. Denno](#), 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)); [Ghost Player, L.L.C. v. State](#), 860 N.W.2d 323 (Iowa 2015).
Congress has absolutely no obligation to select a legislative scheme that a court would later find to be the fairest but need only choose one that is rational and not arbitrary; an appellate court does not sit in judgment on the wisdom of Congress's solution, only its rationality. [Davon, Inc. v. Shalala](#), 75 F.3d 1114 (7th Cir. 1996).
- 5 [Patterson v. New York](#), 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
A jury fee required to be paid by any party claiming a jury of 12 in any civil action in state court does not violate due process as the right to a jury trial is not a fundamental right in civil actions. [Robertson v. Apuzzo](#), 170 Conn. 367, 365 A.2d 824 (1976).
- 6 [People's Wayne County Bank v. Wolverine Box Co.](#), 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024 (1930).
Due process and the Sixth Amendment guarantee a defendant summarily charged in a state court with contempt an opportunity to be heard in his or her defense and to be represented by counsel. [Pounders v. Watson](#), 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997); [Watson v. Block](#), 102 F.3d 433 (9th Cir. 1996), cert. granted, judgment rev'd on other grounds, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997).
- 7 [Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co.](#), 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931); [Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.](#), 178 Md. 38, 12 A.2d 201 (1940); [Lyons v. Goldstein](#), 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).
- 8 [Johnson v. Rodriguez](#), 110 F.3d 299 (5th Cir. 1997).
- 9 [Bute v. People of State of Ill.](#), 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948).

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16B Am. Jur. 2d Constitutional Law § 953

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

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West's Key Number Digest

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The Due Process Clause of the 14th Amendment does not make the statutes of the several states the test of what it requires.¹ A state-created right can, in some circumstances, beget yet other rights to procedures essential to a realization of the parent right; however, the underlying right must have come into existence before it can trigger due-process protection.²

While procedures in civil litigation long-sanctioned by the passage of time and widely used throughout the United States will generally satisfy the Supreme Court as being due proceedings at law or due process of law,³ the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process although it is plainly worth considering in determining whether the practice offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.⁴

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Footnotes

- ¹ [Hebert v. State of La.](#), 272 U.S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102 (1926); [Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.](#), 178 Md. 38, 12 A.2d 201 (1940).
- ² [Connecticut Bd. of Pardons v. Dumschat](#), 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981); [Foley v. Beshear](#), 462 S.W.3d 389 (Ky. 2015).

- 3 [Corn Exchange Bank v. Coler](#), 280 U.S. 218, 50 S. Ct. 94, 74 L. Ed. 378 (1930).
That there may be risks of error in a process does not require holding unconstitutional in terms of due process, an entire statutory and administrative scheme that is generally followed in more than three-fifths of the cases. [Parham v. J. R.](#), 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).
- 4 [Schall v. Martin](#), 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

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16B Am. Jur. 2d Constitutional Law § 954

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 954. Purpose and history of substantive "due process"

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[School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student](#), 90 A.L.R.6th 235
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Trial Strategy

[Proof That School Board Improperly Expelled Student from School](#), 55 Am. Jur. Proof of Facts 3d 313
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Forms

Forms relating to readmission or expulsion of student, generally, see Am. Jur. Pleading and Practice Forms, Colleges and Universities [\[Westlaw®\(r\) Search Query\]](#)

Forms relating to admission, suspension or expulsion, and graduation, generally, see Am. Jur. Pleading and Practice Forms, Schools [\[Westlaw®\(r\) Search Query\]](#)

The principle of due process of law had its origin in England where it was a protection to individuals from arbitrary action by the Crown.¹ In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his or her rights, whether relating to his or her life, liberty, or property.² Due process of law has come since the end of the 19th century to be applied to the field of substantive rights in the form of the proposition that the legislature, as well as the judiciary, is forbidden to act arbitrarily in contravention of the fundamental principles of liberty and justice that lie at the base of all civil and political institutions of the United States.³

The doctrine of substantive due process is concerned with whether a particular state regulation of an individual interest is justified.⁴ The basic test for determining whether an individual's substantive due-process rights have been violated is whether the state can justify the infringement of its legislative activity upon his or her personal rights and liberties.⁵ Hence, substantive due process bars certain government actions, regardless of the fairness of the procedures used to implement them.⁶

The doctrine of substantive due process has the two primary features of specially protecting those fundamental rights and liberties which are, objectively, deeply rooted in the nation's history and tradition, and providing a careful description of some asserted fundamental liberty interest.⁷ In determining whether a plaintiff's asserted liberty interest is fundamental, the court must assess whether it is objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if the liberty interest at issue were sacrificed.⁸

Substantive due process under the Fifth Amendment is an expanded concept which is a limitation upon all the powers of Congress, even the war power.⁹ Moreover, under the 14th Amendment, the right to substantive due process includes the right to be free from state and local government interference with certain constitutionally recognized fundamental rights.¹⁰

Observation:

No abstract right to substantive due process exists under the United States Constitution.¹¹ Such rights are created only by the United States Constitution, not by state laws.¹² Thus, substantive due-process rights are founded not upon state law but upon deeply rooted notions of fundamental personal interests derived from the United States Constitution.¹³

The substantive due-process doctrine does not authorize courts to expand constitutional clauses at will.¹⁴ In fact, as a general matter, the Supreme Court is reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.¹⁵ Thus, a substantive due-process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires the Supreme Court to exercise the utmost care whenever it is asked to break new ground in such field.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

While a State-created liberty interest may be entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment, a state-created liberty interest cannot form the basis of a substantive due process claim. [U.S. Const. Amend. 14](#). [Doe v. University of Nebraska](#), 451 F. Supp. 3d 1062 (D. Neb. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 934](#).
- 2 [Vernon v. State](#), 245 Ala. 633, 18 So. 2d 388 (1944); [Railway Mail Ass'n v. Corsi](#), 293 N.Y. 315, 56 N.E.2d 721 (1944), judgment aff'd, 326 U.S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1945); [Uram v. Roach](#), 47 Wyo. 335, 37 P.2d 793, 95 A.L.R. 1448 (1934).
Under substantive due process, a statute is unconstitutional if it impermissibly restricts a person's life, liberty, or property interest. [People v. Johnson](#), 225 Ill. 2d 573, 312 Ill. Dec. 350, 870 N.E.2d 415 (2007).
As to protection from arbitrary and capricious action, see [§ 958](#).
- 3 [Palko v. State of Connecticut](#), 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (overruled on other grounds by, [Benton v. Maryland](#), 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).
The Due Process Clause of the 14th Amendment, like its Fifth Amendment counterpart, guarantees more than fair process; it also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. [Troxel v. Granville](#), 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
- 4 [People v. Santiago](#), 51 A.D.2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975), order rev'd on other grounds, 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976).
- 5 [State v. Robinson](#), 873 So. 2d 1205 (Fla. 2004).
- 6 [Guertin v. State](#), 912 F.3d 907 (6th Cir. 2019), cert. denied, 140 S. Ct. 933, 205 L. Ed. 2d 522 (2020) and cert. denied, 140 S. Ct. 933, 205 L. Ed. 2d 522 (2020); [Abdi v. Wray](#), 942 F.3d 1019 (10th Cir. 2019); [Grasson v. Board of Educ. of Town of Orange](#), 24 F. Supp. 3d 136, 311 Ed. Law Rep. 244 (D. Conn. 2014); [Cruz-Caraballo v. Rodriguez](#), 113 F. Supp. 3d 484 (D.P.R. 2014); [State v. Robinson](#), 873 So. 2d 1205 (Fla. 2004); [State v. Netland](#), 762 N.W.2d 202 (Minn. 2009); [State v. Germane](#), 971 A.2d 555 (R.I. 2009); [Swanson Hay Company v. State Employment Security Department](#), 1 Wash. App. 2d 174, 404 P.3d 517 (Div. 3 2017),

review denied, 191 Wash. 2d 1004, 428 P.3d 124 (2018) and cert. denied, 139 S. Ct. 605, 202 L. Ed. 2d 430 (2018).

7 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

History and tradition are the starting point but not in all cases the ending point of substantive due-process inquiry. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

8 Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (2008).

9 Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

If the goals sought by federal legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment. Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

10 Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997); Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), as amended, (July 10, 1995); Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995).

11 Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994).

12 Wooten v. Campbell, 49 F.3d 696 (11th Cir. 1995).

13 Nilson v. Layton City, 45 F.3d 369, 97 Ed. Law Rep. 139 (10th Cir. 1995).

14 LeRoy v. Illinois Racing Bd., 39 F.3d 711 (7th Cir. 1994).

15 Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

16 Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

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16B Am. Jur. 2d Constitutional Law § 955

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 955. Reasonableness, rationality, and relationship to object to comply with substantive due process

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[School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student](#), 90 A.L.R.6th 235
[Validity of State Statutes, Regulations, or other Identification Requirements Restricting or Denying Driver's Licenses to Illegal Aliens](#), 16 A.L.R.6th 131
[Marriage Between Persons of Same Sex—United States and Canadian Cases](#), 1 A.L.R. Fed. 2d 1

Where a statute neither interferes with a fundamental right nor singles out a suspect classification,¹ substantive due process demands no more than a reasonable fit between a governmental purpose and the means chosen to advance that purpose.² Under substantive due-process law analysis in such cases, therefore, due process may be characterized as a standard of reasonableness³ which is synonymous with the reasonableness analysis of an equal protection claim.⁴ In fact, the rational basis test is identical under the two rubrics of equal protection and due process.⁵

Accordingly, where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test under which a statute withstands a substantive due-process challenge if the state identifies a legitimate state interest that the legislature could rationally have concluded is served by the statute.⁶ Under rational basis review for a violation of substantive due process, the test is whether the court can conceive of a rational basis for sustaining the legislation; the court need not have evidence that the legislature has actually acted upon that basis.⁷ The test of whether legislation violates due process is whether, in enacting legislation, the legislature is acting in pursuit of permissible state objectives and, if so, whether the means adopted are reasonably related to accomplishment of those objectives.⁸

Observation:

The rational basis test is highly deferential;⁹ its focus is not on the wisdom of the statute.¹⁰ If there is any conceivable set of facts to show a rational basis for the statute, it will be upheld under the rational basis test.¹¹ Thus, when subjecting a state statute to a rational basis review on a substantive due-process claim, a court is not entitled to second-guess the legislature on the factual assumptions or policy considerations underlying the statute.¹²

The only substantive due-process inquiry permitted is whether the legislature rationally might have believed that the predicted reaction would occur or that the desired end would be served. It is up to the person challenging the statute to convince the court that the legislative facts on which the classification of the statute is apparently based could not reasonably be conceived as true by the governmental decision maker.¹³ The true purpose of a governmental policy is irrelevant for a rational basis analysis under the Due Process Clause. The question is only whether a rational relationship exists between the policy and a conceivable legitimate governmental objective. If it is at least debatable whether a rational relationship exists between a governmental policy and a conceivable legitimate governmental objective, there is no substantive due-process violation.¹⁴ Governmental action is rationally related to a legitimate goal, as required by substantive due process, unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare.¹⁵

Caution:

The fact that a legislative act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, and thus, subject to a facial substantive due-process challenge.¹⁶

Footnotes

- 1 § 956.
- 2 Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); Alharbi v. Miller, 368 F. Supp. 3d 527, 103 Fed. R. Serv. 3d 384 (E.D. N.Y. 2019).
Substantive due-process analysis requires a test of reasonableness of a statute in relation to the state's power to enact such legislation. *Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283 (2009).
- 3 Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); *In re Roel*, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 144 N.E.2d 24 (1957); *Bunch v. Britton*, 253 N.C. App. 659, 802 S.E.2d 462 (2017); *In re Lutker*, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
The test for determining whether a statute violates substantive due-process rights is whether it bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive. *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371 (Fla. 1998).
- 4 *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004).
As to the requirement of a rational basis for legislative classifications for equal protection purposes, generally, see § 861.
- 5 *Gamble v. City of Escondido*, 104 F.3d 300, 19 A.D.D. 740 (9th Cir. 1997).
- 6 *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639 (3d Cir. 1995); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 32 Fed. R. Serv. 3d 25 (11th Cir. 1995); *Blue v. McBride*, 252 Kan. 894, 850 P.2d 852 (1993), as modified on denial of reh'g, (July 21, 1993); *Dempsey v. Alston*, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009).
Keeping a list of predatory offenders is rationally related to the legitimate state interest of solving crimes; thus, the predatory offender registration statute does not violate a defendant's constitutional right to substantive due process. *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999).
- 7 *Dutkiewicz v. Dutkiewicz*, 289 Conn. 362, 957 A.2d 821 (2008).
Legislation need not expressly state a rationale nor must it contain legislative findings to support the law; rather, the legislation survives a substantive due-process challenge if the court can conceive of a rational basis for the legislation. *Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287 (Ct. App. 2011).
A statute suspending the Social Security retirement benefits of a convicted felon during incarceration did not violate substantive due process as the statute had the rational basis of conserving scarce resources. *Butler v. Apfel*, 144 F.3d 622 (9th Cir. 1998).
- 8 *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996); *Montgomery v. Daniels*, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975).
Under the rational basis test, the court's inquiry into the constitutionality of a statute is twofold: the court must determine whether there is a legitimate state interest behind the legislation, and if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it. *People v. Johnson*, 225 Ill. 2d 573, 312 Ill. Dec. 350, 870 N.E.2d 415 (2007).
- 9 *Parrino v. Price*, 869 F.3d 392 (6th Cir. 2017); *Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13 (Fla. 3d DCA 2016); *People v. Maillet*, 2019 IL App (2d) 161114, 2019 WL 2754563 (Ill. App. Ct. 2d Dist. 2019); *Baddock v. Baltimore County*, 239 Md. App. 467, 197 A.3d 546 (2018), cert. denied, 463 Md. 545, 206 A.3d 325 (2019).
- 10 *Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13 (Fla. 3d DCA 2016); *People v. Pepitone*, 2018 IL 122034, 423 Ill. Dec. 816, 106 N.E.3d 984 (Ill. 2018).
- 11 *In re Maurice D.*, 393 Ill. Dec. 389, 34 N.E.3d 590 (App. Ct. 4th Dist. 2015).
- 12 *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639 (3d Cir. 1995); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167 (5th Cir. 1996) (holding that a rational basis review under the Due Process Clause does not authorize the federal judiciary to sit as a superlegislature to judge the wisdom or desirability of state legislative policy determinations).

- 13 [Alexander v. Whitman](#), 114 F.3d 1392 (3d Cir. 1997); [Carbon Fuel Co. v. USX Corp.](#), 100 F.3d 1124 (4th Cir. 1996); [Valot v. Southeast Local School Dist. Bd. of Educ.](#), 107 F.3d 1220, 1997 FED App. 0087P (6th Cir. 1997); [Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n](#), 110 F.3d 547 (8th Cir. 1997).
- 14 [FM Properties Operating Co. v. City of Austin](#), 93 F.3d 167 (5th Cir. 1996); [Dodd v. Hood River County](#), 59 F.3d 852 (9th Cir. 1995).
- Where plaintiffs rely on substantive due process to challenge a governmental action that does not impinge on fundamental rights, a court does not require that the government's action actually advance its stated purpose; instead, it is sufficient that the government could have had a legitimate reason for acting as it did. [Halverson v. Skagit County](#), 42 F.3d 1257 (9th Cir. 1994), as amended on denial of reh'g, (Feb. 9, 1995).
- 15 [Sylvia Landfield Trust v. City of Los Angeles](#), 729 F.3d 1189 (9th Cir. 2013).
- 16 [Roulette v. City of Seattle](#), 97 F.3d 300 (9th Cir. 1996), as amended on denial of reh'g and reh'g en banc, (Sept. 17, 1996).

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16B Am. Jur. 2d Constitutional Law § 956

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 956. Strict scrutiny of interference with fundamental rights and discriminatory classifications for substantive due-process analysis

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[School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235](#)
[Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1](#)

Where an individual interest involves a fundamental right, the test of substantive due process is whether a compelling state interest is advanced by the regulation and whether the regulation is the least restrictive method available to effectuate the compelling state interest.¹ Under such a strict scrutiny analysis, legislation which significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest² and is narrowly tailored to effectuate only that interest.³

Observation:

This test of the "least restrictive method" in advancing a "compelling state interest" is similar to the test of the "two-tiered" standard used in considering equal protection issues.⁴

Rights are "fundamental," requiring a governmental regulation infringing those rights to be narrowly tailored to serve a compelling state interest, when they are implicit in the concept of ordered liberty or deeply rooted in the nation's history and tradition.⁵

It has been said that substantive due-process challenges, just as equal protection ones, require a court to determine whether the challenged policy or statute creates a suspect class or affects a fundamental right.⁶ Unless a classification is a hostile and oppressive discrimination against particular persons and classes, it will not trigger heightened scrutiny.⁷

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Footnotes

- 1 [Immediato v. Rye Neck School Dist.](#), 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996).
- 2 [Alexander v. Whitman](#), 114 F.3d 1392 (3d Cir. 1997); [Hayashi v. Illinois Dept. of Financial and Professional Regulation](#), 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014); [Sparks v. Sparks](#), 2013 ME 41, 65 A.3d 1223 (Me. 2013).
- 3 [Alexander v. Whitman](#), 114 F.3d 1392 (3d Cir. 1997); [Hayashi v. Illinois Dept. of Financial and Professional Regulation](#), 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014).
A government memo, providing that the advancement of funds to cover the legal fees of accounting firm employees, suspected of committing accounting fraud, would be considered as a negative factor in assessing whether the employer was sufficiently cooperating with the government investigation to forestall the indictment, violated the Due Process Clause, when analyzed under the strict scrutiny test; while the provision advanced a compelling government interest in being able to investigate instances of fraud, it was not narrowly tailored to achieve the objective, as the payments to be considered were not limited to those actually used to obstruct the investigation, and the relationship between the payments and the level of employer cooperation was problematic. [U.S. v. Stein](#), 435 F. Supp. 2d 330 (S.D. N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).
- 4 [People v. Santiago](#), 51 A.D.2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975), *order rev'd on other grounds*, 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976).
As to standards of review used in considering equal protection issues, generally, see §§ 849 to 854.
- 5 § 935.
- 6 [Snook v. Joyce Homes, Inc.](#), 215 P.3d 1210 (Colo. App. 2009).
For the purposes of due-process analysis, a city council's amendment extending term limits for city officials from two terms to three terms neither interfered with a fundamental right nor singled out a suspect classification. [Molinari v. Bloomberg](#), 564 F.3d 587 (2d Cir. 2009).
- 7 [Deja Vu Showgirls v. State, Dept. of Tax.](#), 130 Nev. 719, 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (2014).

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16B Am. Jur. 2d Constitutional Law § 957

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 957. Rights protected by substantive due process

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[Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1](#)

The substantive component of the Due Process Clause protects only those rights that are fundamental.¹ The protection of substantive due process is narrow and covers only state action which is so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any predeprivation procedural protections or of adequate rectification by any postdeprivation state remedies.²

According to these principles, for instance, a state constitutional provision permitting individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited does not deny the shopping center owner due process in that such a law is not unreasonable, arbitrary, or capricious.³ Losses from random and unauthorized official acts are likewise not violations of the Due Process Clause so long as there is an adequate postdeprivation remedy.⁴ Moreover, a city's alleged failure to follow state law in denying a permit to renovate two apartment buildings is not a substantive

due-process violation.⁵ Nevertheless, substantive due-process protection has been extended to certain rights, such as the right to privacy, that are not enumerated in the Bill of Rights.⁶ For instance, a parent's interest in the care, custody, and control over his or her child is a fundamental right which is protected by substantive due process.⁷

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Footnotes

- 1 [Wright v. Lovin](#), 32 F.3d 538, 93 Ed. Law Rep. 1136 (11th Cir. 1994); [Nelson v. City of Orem](#), 2013 UT 53, 309 P.3d 237 (Utah 2013).
Substantive due process under the 14th Amendment depends on the existence of a fundamental liberty interest. [Idris v. City of Chicago, Ill.](#), 552 F.3d 564 (7th Cir. 2009).
Whether a property interest is of a particular quality protected by substantive due process depends on whether the interest is fundamental under the United States Constitution. [Temple-Inland, Inc. v. Cook](#), 82 F. Supp. 3d 539 (D. Del. 2015).
- 2 [Siena Corporation v. Mayor and City Council of Rockville Maryland](#), 873 F.3d 456 (4th Cir. 2017).
Substantive due process prevents the government from enacting legislation that is arbitrary or discriminatory or lacks a reasonable relationship to a proper legislative purpose. [Kavanau v. Santa Monica Rent Control Bd.](#), 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997).
As to protection from arbitrary and capricious action, see § 958.
- 3 [PruneYard Shopping Center v. Robins](#), 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).
- 4 [Tri County Industries, Inc. v. District of Columbia](#), 104 F.3d 455 (D.C. Cir. 1997).
- 5 [Albiero v. City of Kankakee](#), 122 F.3d 417, 38 Fed. R. Serv. 3d 1008 (7th Cir. 1997).
- 6 [Skinner v. City of Miami, Fla.](#), 62 F.3d 344 (11th Cir. 1995).
- 7 [Dutkiewicz v. Dutkiewicz](#), 289 Conn. 362, 957 A.2d 821 (2008).

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16B Am. Jur. 2d Constitutional Law § 958

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 958. Arbitrary or capricious actions as violating substantive due process

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[School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235](#)
[Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of Federal Constitution's Fifth and Fourteenth Amendments—post-Williamson cases, 111 A.L.R. Fed. 483](#)

Protection from arbitrary action is the essence of substantive due process.¹ Due process demands that a law not be unreasonable or arbitrary and that it be reasonably related and applied to an actual and manifest evil.² The modern framework for a substantive due-process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose.³

A statute or a municipal ordinance is arbitrary and capricious and, hence, is constitutionally invalid as transgressing due-process requirements if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest; however, if any conceivable legitimate governmental interest supports the ordinance, that measure is

not arbitrary and capricious and, hence, cannot offend substantive due-process norms.⁴ Moreover, the courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which, through a rule of evidence, arbitrarily deprives a litigant of his or her rights or which permits a defendant to suffer conviction without due process of law.⁵

Observation:

The means by which an ordinance comes to pass is irrelevant to the question of whether the substance of an ordinance is constitutionally infirm on its face under substantive due-process analysis.⁶

A statute runs afoul of the Due Process Clause only if it manifests a patently arbitrary classification, utterly lacking in any rational justification.⁷ Thus, due process may be violated if the government acts arbitrarily or capriciously.⁸

Practice Tip:

To establish a violation of substantive due process arising from some challenged governmental conduct, a plaintiff is ordinarily required to prove that such conduct is clearly arbitrary and unreasonable, having no substantial relationship to the public's health, safety, morals, or general welfare.⁹ Plaintiffs challenging an economic statute on substantive due-process grounds have the burden of proving that the statute is arbitrary and irrational such that no rational relationship exists between the statute and any legitimate government objective.¹⁰

All state statutes, ordinances, and regulations may be challenged on the basis that they are wholly arbitrary or irrational in purpose or means.¹¹ However, the states have considerable flexibility, for instance, in determining the level of punitive damages that they will allow in different classes of cases and in any particular case and only when an award can fairly be categorized as grossly excessive in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the 14th Amendment.¹² Although a reasonableness standard rather than a precise formula is imposed on the award of substantive damages, the Due Process Clause of the United States Constitution does impose a substantive limit on punitive damage awards, and such decision should not be committed to the unreviewable discretion of a jury.¹³

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Footnotes

- 1 Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956);
Jack Lincoln Shops v. State Dry Cleaners' Bd., 1943 OK 28, 192 Okla. 251, 135 P.2d 332 (1943).
The touchstone of due process is protection of the individual against arbitrary actions of the government.
Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Jauch v. Choctaw County, 874
F.3d 425 (5th Cir. 2017), cert. denied, 139 S. Ct. 638, 202 L. Ed. 2d 491 (2018); Dias v. City and County of
Denver, 567 F.3d 1169 (10th Cir. 2009); Bailey v. Kirsch, 2020 WL 605881 (E.D. Pa. 2020); State v. Schmidt,
220 Ariz. 563, 208 P.3d 214 (2009); Bonner v. City of Brighton, 495 Mich. 209, 848 N.W.2d 380 (2014).
- 2 Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).
A claim that a person is entitled to substantive due process means that state action which deprives him or her
of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate
that the judiciary will characterize it as arbitrary. Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1
(7th Cir. 1974).
As to the standard of reasonableness and the rational basis test with regard to substantive due process,
generally, see § 955.
- 3 Immediato v. Rye Neck School Dist., 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996); Honeywell, Inc. v.
Minnesota Life and Health Ins. Guar. Ass'n, 110 F.3d 547 (8th Cir. 1997).
- 4 37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 1997 FED App. 0158P (6th Cir. 1997).
A rule is arbitrary and capricious, and thus, violates due process when it lacks a legitimate reason to support
it; administrative rules are supported by legitimate reasons when they are based on some legitimate position
of the administrative agency promulgating them. Texas Workers' Compensation Com'n v. Patient Advocates
of Texas, 136 S.W.3d 643 (Tex. 2004).
As to legitimate governmental interests and the reasonableness requirement in this regard, see § 955.
- 5 People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968) (rejected on other grounds by,
California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)) and (rejected on other grounds
by, People v. Chavez, 26 Cal. 3d 334, 161 Cal. Rptr. 762, 605 P.2d 401 (1980)).
- 6 WMX Technologies, Inc. v. Gasconade County, Mo., 105 F.3d 1195 (8th Cir. 1997).
- 7 U.S. v. Neal, 46 F.3d 1405 (7th Cir. 1995) (rejected on other grounds by, U.S. v. Muschik, 49 F.3d 512 (9th
Cir. 1995)) and judgment aff'd, 516 U.S. 284, 116 S. Ct. 763, 133 L. Ed. 2d 709 (1996).
In determining the validity, under the Due Process Clause of the 14th Amendment, of a zoning restriction,
the critical constitutional inquiry is whether the zoning restriction produces arbitrary or capricious results.
City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).
- 8 Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099 (3d Cir. 1997); Williams v. Wynne, 533 F.3d
360 (5th Cir. 2008); State v. Robinson, 873 So. 2d 1205 (Fla. 2004); Town & Country Foods, Inc. v. City of
Bozeman, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283 (2009); State v. Germane, 971 A.2d 555 (R.I. 2009).
- 9 Patel v. Penman, 103 F.3d 868 (9th Cir. 1996).
- 10 In re Blue Diamond Coal Co., 79 F.3d 516, 1996 FED App. 0097P (6th Cir. 1996).
- 11 Coleman v. Watt, 40 F.3d 255, 30 Fed. R. Serv. 3d 982 (8th Cir. 1994).
- 12 BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).
- 13 Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994).

16B Am. Jur. 2d Constitutional Law § 959

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 959. Bias and bad faith as violating substantive due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3880, 3892 to 3895

To support a claim of a substantive due-process violation, a plaintiff must show some irrational government action or government action that is motivated by bias, some improper purpose, or bad faith.¹

Due-process guarantees an absence of actual bias on the part of a judge.² Under the Due Process Clause, no one can be a judge in his or her own case, and no one is permitted to try cases where he or she has an interest in the outcome.³ The Fourteenth Amendment's Due Process Clause may sometimes demand recusal even when a judge has no actual bias, recusal being required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.⁴ A requirement that justice must satisfy the appearance of justice, even to the point of requiring a trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where a private party is given statutory authority to adjudicate a dispute.⁵ To implicate due process, claims of general institutional bias must be harnessed to a further showing, such as a potential conflict of interest or pecuniary stake in the outcome of the litigation.⁶

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Footnotes

- 1 [Ersek v. Township of Springfield](#), 102 F.3d 79 (3d Cir. 1996).
The destruction during Hurricane Katrina of certain seized patient records did not result in a due-process violation and require suppression of the remaining files, absent a showing that the government acted in bad faith, in a prosecution for conspiracy to illegally dispense prescription drugs. [U.S. v. Prejean](#), 429 F. Supp. 2d 782 (E.D. La. 2006).
- 2 As to protection from arbitrary and capricious actions, generally, see § 958.
- 3 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
- 4 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
- 5 [Rippo v. Baker](#), 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017).
- 6 [Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California](#), 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).
- [Brooks v. New Hampshire Supreme Court](#), 80 F.3d 633 (1st Cir. 1996).

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16B Am. Jur. 2d Constitutional Law § 960

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 960. Oppressive or shocking behavior as violating substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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[School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student](#), 90 A.L.R.6th 235

State conduct offends substantive due process when it shocks the conscience,¹ constitutes a force that is so brutal as to offend even hardened sensibilities,² or is offensive to human dignity.³ In fact, only a substantial infringement of state law prompted by personal or group animus or a deliberate flouting of the law that trammels significant personal or property rights is a substantive due-process violation.⁴ Substantive due process prevents governmental power from being used for purposes of oppression or an action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.⁵ The "shock the conscience" standard is satisfied where the conduct was intended to injure in some way unjustifiable by any government interest, or in some circumstances if it resulted from deliberate indifference.⁶ However, negligence, without more, is simply insufficient to meet the conscience-shocking standard to demonstrate a substantive due-process violation.⁷ It is not enough that the government official's behavior meets the lowest common denominator of customary tort liability.⁸

Due process can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights, as a check on official misconduct which infringes on a fundamental right or as a limitation on official misconduct which, although not infringing on a fundamental right, is so literally conscience-shocking, and hence oppressive, as to rise to the level of a substantive due-process violation.⁹ However, a mere violation of state law is not the kind of truly irrational governmental action which gives rise to a substantive due-process claim.¹⁰

Due process is not merely a procedural safeguard; instead, it reaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three.¹¹ Where a government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest.¹²

Observation:

The fact that a statute may, in certain instances, be inequitable, harsh, or oppressive does not violate the Due Process Clause, provided that it operates without any discrimination and in like manner against all persons of a class.¹³ For instance, deliberate indifference that shocks in one environment may not be so patently egregious in another, and concern with preserving constitutional proportions of substantive due-process demands exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.¹⁴

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Footnotes

- 1 [Rosales-Mireles v. U.S.](#), 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018); [L.R. v. School District of Philadelphia](#), 836 F.3d 235, 336 Ed. Law Rep. 90 (3d Cir. 2016); [Jordan v. Fisher](#), 823 F.3d 805 (5th Cir. 2016), as revised, (June 27, 2016); [Williams v. Mannis](#), 889 F.3d 926 (8th Cir. 2018).
- 2 [Faucher v. Rodziewicz](#), 891 F.2d 864 (11th Cir. 1990).
- 3 [Williams v. Mannis](#), 889 F.3d 926 (8th Cir. 2018).
- 4 [Tri County Industries, Inc. v. District of Columbia](#), 104 F.3d 455 (D.C. Cir. 1997).
Substantial prejudice is required to establish a violation of due process. [Felder v. Charleston County School Dist.](#), 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).
- 5 [Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia](#), 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).
A court would have to see a mindless abuse of power, or a deliberate exercise of power as an instrument of oppression, or power exercised without any reasonable justification in the service of a legitimate governmental objective before delayed incarceration would shock the conscience for the purpose of demonstrating that delayed incarceration amounted to a waiver of incarceration by the state under the Due Process Clause. [Bonebrake v. Norris](#), 417 F.3d 938 (8th Cir. 2005).
As to legitimate governmental interests and the reasonableness requirement in this regard, see § 955.
- 6 [Rosales-Mireles v. U.S.](#), 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018).

- 7 [Gonzalez-Fuentes v. Molina](#), 607 F.3d 864 (1st Cir. 2010).
- 8 [White v. Smith](#), 696 F.3d 740 (8th Cir. 2012).
- 9 [Howard v. Grinage](#), 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996); [L.A. Ray Realty v. Town Council of Town of Cumberland](#), 698 A.2d 202 (R.I. 1997).
- The alleged conduct of the then-governor of Puerto Rico, in exerting undue influence over the board of directors for a government-sponsored banking institution so that the directors would deny a loan for which a pharmaceutical company qualified due to the company's political affiliations did not rise to the level of conscience-shocking behavior required to support the company's substantive due-process claim against the former governor. [Pagan v. Calderon](#), 448 F.3d 16 (1st Cir. 2006).
- 10 [WMX Technologies, Inc. v. Gasconade County, Mo.](#), 105 F.3d 1195 (8th Cir. 1997).
- A state-law violation does not give rise to a substantive due-process violation although the manner in which violation occurs as well as its consequences are crucial factors to be considered. [Tri County Industries, Inc. v. District of Columbia](#), 104 F.3d 455 (D.C. Cir. 1997).
- 11 [Poe v. Ullman](#), 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961).
- 12 [Valot v. Southeast Local School Dist. Bd. of Educ.](#), 107 F.3d 1220, 1997 FED App. 0087P (6th Cir. 1997).
- As to the standard of reasonableness and the rational basis test with regard to substantive due process, generally, see § 955.
- 13 [Wickard v. Filburn](#), 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (holding that a statute is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work an inequitable result).
- That certain members of a class subject to a regulation may suffer greater economic loss than others does not render the regulation violative of due process if it is fair and equitable to class as whole. [Rasulis v. Weinberger](#), 502 F.2d 1006 (7th Cir. 1974).
- As to discrimination and heightened scrutiny under substantive due process, see § 956.
- As to the necessity that laws operate equally, generally, see § 961.
- 14 [County of Sacramento v. Lewis](#), 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

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16B Am. Jur. 2d Constitutional Law § 961

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 961. Necessity that laws operate equally for substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  [3861](#), [3893](#), [3902](#), [3906](#)

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[Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases, 19 A.L.R. Fed. 2d 1](#)

[Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases, 178 A.L.R. Fed. 25](#)

[Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases, 172 A.L.R. Fed. 1](#)

Although the Fifth Amendment contains no Equal Protection Clause and restrains only such discriminatory legislation by Congress as amounts to a denial of due process,¹ "due process of law" and the equivalent phrase "law of the land"² have frequently been defined to mean a general³ and public law operating equally on all persons in like circumstances⁴ and not a partial or private law affecting the rights of a particular individual or class of individuals⁵ in a way in which the same rights of other persons are not affected.⁶

To avoid overbreadth, the Due Process Clause does not require Congress to make statutory classifications that fit every individual with precisely the same degree of relevance⁷ although a clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct.⁸ Subject to that caveat, under this guarantee not only must a statute embrace all persons in a like situation, but the classification also must be natural and reasonable, not arbitrary and capricious.⁹ Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class or of the community at large unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community.¹⁰

In order to make out a disparate impact warranting further scrutiny of a federal statutory classification under the equal protection analysis of the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against suffers a significant deprivation of a benefit or imposition of a substantial burden.¹¹ An act which affects only and exhausts itself upon a particular person or his or her rights and privileges and has no relation to the community in general, is rather a sentence than a law and one which condemns without a hearing. However, due process is not violated by legislation which does not find equivalence where there is none or which does not lay on a burden unrelated to privilege or benefit.¹² As a general rule, whatever, in the matter of classification, complies with the requirements as to the equal protection of the laws will, so far as such an objection is concerned, be likewise upheld as amounting to due process of law. In fact, the courts may refer to both clauses at once in discussing the constitutionality of statutes.¹³

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Footnotes

- 1 § 825.
- 2 § 943.
- 3 Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 1819 WL 2201 (1819); Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); J.O. Plott Co. v. H.K. Ferguson Co., 202 N.C. 446, 163 S.E. 688 (1932).
- 4 Jones v. Brim, 165 U.S. 180, 17 S. Ct. 282, 41 L. Ed. 677 (1897); Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944); Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); In re Lutker, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
A state can, consistently with the 14th Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination. Douglas v. People of State of Cal., 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).
Due process is secured by laws operating on all alike. Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 (6th Cir. 1956).
- 5 Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943).
As to the fact that due process of law as guaranteed by the 14th Amendment has frequently been defined in terms of equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice, see § 824.
- 6 State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)).
The Department of Housing and Urban Development's decision, permitting a city's urban renewal project to proceed after it became aware that discrimination was being practiced by the city, constituted a denial of the Fifth Amendment right of due process owed to the black plaintiffs and by failing to halt such program, which had the effect of displacement of black residents without relocation, the Department perpetuated segregation in public housing and participated in a denial to the plaintiffs of their constitutional rights. Garrett v. City of Hamtramck, 503 F.2d 1236, 19 Fed. R. Serv. 2d 514 (6th Cir. 1974).
- 7 U.S. v. McKenzie, 99 F.3d 813 (7th Cir. 1996).

- 8 [Grayned v. City of Rockford](#), 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
- 9 [People ex rel. Doty v. Connell](#), 9 Ill. 2d 390, 137 N.E.2d 849, 62 A.L.R.2d 1255 (1956); [State v. Garford Trucking](#), 4 N.J. 346, 72 A.2d 851, 16 A.L.R.2d 1407 (1950).
- The Due Process Clause bars a statute which manifests a patently arbitrary classification, utterly lacking in rational justification. [Flemming v. Nestor](#), 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
- The Due Process Clause bars federal legislation embodying a baseless classification. [Galvan v. Press](#), 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).
- As to the relationship between due process of law and equal protection of the laws, see §§ 824, 825.
- As to protection against arbitrary and capricious actions, see § 958.
- 10 [Metropolitan Trust Co. v. Jones](#), 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); [Patino v. Catherwood](#), 29 N.Y.2d 331, 327 N.Y.S.2d 638, 277 N.E.2d 658 (1971).
- Legislation, even though it is within the police power, may violate due process if it is discriminatory in that it deals differently with different classes of persons without the existence of some natural and substantial difference, germane to the substantive purposes of the legislation, between those within the class included and those whom it leaves untouched. [State v. Hurliman](#), 143 Conn. 502, 123 A.2d 767 (1956).
- As to discrimination and heightened scrutiny under substantive due process, see § 956.
- 11 [Califano v. Boles](#), 443 U.S. 282, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979).
- 12 [U.S. v. Manufacturers Nat. Bank of Detroit](#), 363 U.S. 194, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960).
- 13 [Knebel v. Hein](#), 429 U.S. 288, 97 S. Ct. 549, 50 L. Ed. 2d 485 (1977); [State v. Garford Trucking](#), 4 N.J. 346, 72 A.2d 851, 16 A.L.R.2d 1407 (1950); [People v. Passantino](#), 83 Misc. 2d 409, 372 N.Y.S.2d 451 (N.Y. City Ct. 1975).

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16B Am. Jur. 2d Constitutional Law § 962

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 962. Definiteness or vagueness of laws, regulations, and orders as related to substantive due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3905

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[Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, 12 A.L.R.3d 1448](#)

The void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and 14th Amendments,¹ and it is a general principle of statutory law that a statute must be definite to be valid.² The protections provided by the Due Process Clause of the Fifth Amendment require the invalidation of laws that are impermissibly vague.³

Under due-process principles, laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.⁴ To pass constitutional muster, a statute challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited⁵ or what the law demands of them,⁶ and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.⁷ The void-for-vagueness doctrine guards against arbitrary or discriminatory

law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.⁸ In that sense, the doctrine is a corollary of the separation of powers, requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.⁹

A statute is so vague as to violate the Due Process Clause where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices or where its language is such that people of common intelligence must necessarily guess at its meaning.¹⁰ Conversely, a statute is not unconstitutionally vague where it is set out in terms as to which an ordinary person exercising ordinary common sense can sufficiently understand and comply.¹¹ The standard of definiteness which statutory language must meet if the statute is to comport with the requirements of due process is not one which it is impossible to satisfy.¹² A statute is sufficiently definite for purposes of due process if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.¹³ A statute does not offend against the Due Process Clause because it contains no preamble or other statement of purposes and objectives.¹⁴

Observation:

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications.¹⁵

Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh.¹⁶ Moreover, a statute is not unconstitutionally vague merely because clearer and more precise language might have been used since the United States Constitution does not require impossible standards of statutory clarity.¹⁷ In addition, a statute or regulation is not so vague as to deny due process merely because it occasionally requires the trier-of-fact to determine the question of reasonableness.¹⁸ Similarly, there is authority for the view that a statute will be upheld by the Supreme Court against an attack on the ground of vagueness where an appropriate construction of the statute by a state court has removed such alleged vagueness.¹⁹ In determining the constitutionality of a statutory provision alleged to be void for vagueness, the state courts are bound by the standard of vagueness laid down by the United States Supreme Court.²⁰

The degree of statutory imprecision which the Constitution's Due Process Clause allows varies with the nature of the enactment²¹ and the correlative needs for notice and protection from unequal enforcement.²² Thus, courts demand less precision of statutes that impose only civil penalties than of criminal statutes because their consequences are less severe.²³ Moreover, the vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the United States Constitution.²⁴ For instance, while vague laws in any area are constitutionally infirm,²⁵ when First Amendment rights are involved, the court looks even more closely lest under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer; such a law must be narrowly drawn to prevent the supposed evil.²⁶

The rules as to definiteness and vagueness apply also to an order of a court.²⁷ In addition, an executive order must, in order to satisfy the constitutional requirement of due process, show the existence of the particular circumstances and conditions under which the making of such an order has been authorized by Congress, but Congress may ratify such an order either expressly or implicitly.²⁸

CUMULATIVE SUPPLEMENT

Cases:

In prohibiting overly vague laws, the due process void-for-vagueness doctrine seeks to ensure that persons of ordinary intelligence have fair warning of what a law prohibits, and, in cases where the statute abuts upon sensitive areas of basic First Amendment freedoms, avoid chilling the exercise of First Amendment rights. [U.S. Const. Amends. 1, 14](#). [ACA Connects - America's Communications Association v. Frey](#), 471 F. Supp. 3d 318 (D. Me. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Columbia Natural Resources, Inc. v. Tatum](#), 58 F.3d 1101, 1995 FED App. 0203P (6th Cir. 1995); [Stephenson v. Davenport Community School Dist.](#), 110 F.3d 1303, 117 Ed. Law Rep. 443 (8th Cir. 1997).
The vagueness doctrine is founded solely on the requirement of due process and may not be applied unless the challenged rule affects interests protected by the Due Process Clause. [Maroney v. University Interscholastic League](#), 764 F.2d 403, 25 Ed. Law Rep. 765 (5th Cir. 1985).
- 2 [Am. Jur. 2d, Statutes § 234](#); [Am. Jur. 2d, Criminal Law § 15](#).
- 3 [F.C.C. v. Fox Television Stations, Inc.](#), 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).
- 4 [Sessions v. Dimaya](#), 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018); [F.C.C. v. Fox Television Stations, Inc.](#), 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).
- 5 [Upton v. S.E.C.](#), 75 F.3d 92 (2d Cir. 1996); [Columbia Gas Transm. Corp. v. Levin](#), 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).
- 6 [United States v. Davis](#), 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019); [F.C.C. v. Fox Television Stations, Inc.](#), 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).
The purpose of the fair notice requirement under the vagueness doctrine is to enable the ordinary citizen to conform his or her conduct to the law as no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. [City of Chicago v. Morales](#), 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).
- 7 [F.C.C. v. Fox Television Stations, Inc.](#), 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012); [U.S. v. Wunsch](#), 84 F.3d 1110 (9th Cir. 1996); [Columbia Gas Transm. Corp. v. Levin](#), 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).
- 8 [Sessions v. Dimaya](#), 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).
An unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, or permits them to prescribe the sentences or sentencing range available. [Beckles v. U.S.](#), 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).
- 9 [Sessions v. Dimaya](#), 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).
- 10 [Keyishian v. Board of Regents of University of State of N. Y.](#), 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); [Georgia Pacific Corp. v. Occupational Safety and Health Review Com'n](#), 25 F.3d 999 (11th Cir. 1994); [Wotton v. Bush](#), 41 Cal. 2d 460, 261 P.2d 256 (1953); [Trio Distributor Corp. v. City of Albany](#), 2

N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957); *State v. Abner*, 43 Ohio App. 2d 141, 72 Ohio Op. 2d 355, 334 N.E.2d 530 (8th Dist. Cuyahoga County 1974).

The 14th Amendment's due-process doctrine concerning vagueness of statutes incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers-of-fact in order to prevent arbitrary and discriminatory enforcement; there is a denial of due process where inherently vague statutory language permits selective law enforcement. *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *People v. Cilento*, 2 N.Y.2d 55, 156 N.Y.S.2d 673, 138 N.E.2d 137 (1956).

Kingsley Intern. Pictures Corp. v. Regents of University of N.Y., 4 N.Y.2d 349, 175 N.Y.S.2d 39, 151 N.E.2d 197 (1958), judgment rev'd on other grounds, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959).

Associated Builders and Contractors, Saginaw Valley Area Chapter v. Director, Dept. of Consumer & Industry Services, 267 Mich. App. 386, 705 N.W.2d 509 (2005).

Serrero v. Cigarette Service Co., 35 Ohio Op. 260, 74 N.E.2d 841 (C.P. 1946), judgment aff'd, 48 Ohio L. Abs. 484, 74 N.E.2d 853 (Ct. App. 8th Dist. Cuyahoga County 1947), judgment aff'd, 148 Ohio St. 519, 36 Ohio Op. 171, 76 N.E.2d 91 (1947).

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Barsky v. Board of Regents of University, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954).

U. S. v. Powell, 423 U.S. 87, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975); *State v. Schuster's Exp. Inc.*, 5 Conn. Cir. Ct. 472, 256 A.2d 792 (1969); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), judgment aff'd, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

State v. Marathon Oil Co., 528 P.2d 293 (Alaska 1974).

State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940).

In re Davis, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (2d Dist. 1966).

Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

Advance Pharmaceutical, Inc. v. U.S., 391 F.3d 377 (2d Cir. 2004).

The due-process determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible must be made in light of the facts presented in the given case and the nature of the enactment challenged. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

Little Arm Inc. v. Adams, 13 F. Supp. 3d 914 (S.D. Ind. 2014); *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998).

The Due Process Clause's prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process. *Johnson v. U.S.*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

Colautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).

Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).

A state statute which required teachers to take an oath promising that they would support the constitutions and laws of the state and the United States and would, by precept and example, promote respect for the flag and the institutions of the state and the United States was unconstitutionally vague; the vice of unconstitutional vagueness was further aggravated because the statute operated to inhibit First Amendment freedoms. *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

McCreery v. Libby-Owens-Ford Glass Co., 363 Ill. 321, 2 N.E.2d 290, 105 A.L.R. 75 (1936).

Am. Jur. 2d, United States § 23.

16B Am. Jur. 2d Constitutional Law § 963

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 963. Lack of success before tribunal as violating substantive due process; errors of tribunal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3893

The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guarantee¹ since due process secures only an opportunity to be heard, not guaranteed or probable success.² Nor is due process denied the unsuccessful party merely because a judgment awards relief other than and different from that which has been sought in the pleadings.³ The 14th Amendment does not raise a federal question in every case to test the justice of a decision.⁴

Although the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.⁵ The 14th Amendment does not, in guaranteeing due process, assure immunity from judicial error.⁶ Moreover, not every trial error or infirmity which might call for application of an appellate court's supervisory powers correspondingly constitutes a failure to observe that fundamental fairness essential to the very concept of justice.⁷ Even an erroneous decision of a court on matters within its jurisdiction does not deprive the unsuccessful party of his or her rights under this guarantee where the parties have been fully heard in the regular course of judicial proceedings.⁸ The same rule applies to the errors of other tribunals or officers.⁹ It seems clear that a violation of the Due Process Clause may be committed by the state judiciary at least in construing a state statute.¹⁰ However, the United States Supreme Court cannot interfere unless the judgment amounts to a merely arbitrary or

capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.¹¹

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Footnotes

- 1 [Worcester County Trust Co. v. Riley](#), 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937); [Melville v. Weybrew](#), 108 Colo. 520, 120 P.2d 189 (1941).
A misapprehension by a litigant of the steps which his or her best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance but not grounds for interference as a denial of constitutional rights. [Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
When appellants are afforded every opportunity to participate in the proceeding below, the simple fact that the outcome is not as appellants would have wished is not tantamount to any denial of due process. [Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n](#), 58 Ark. App. 145, 946 S.W.2d 730 (1997).
- 2 [Boner v. Eminence R-1 School Dist.](#), 55 F.3d 1339, 100 Ed. Law Rep. 886 (8th Cir. 1995).
- 3 [Connolly v. Bell](#), 309 N.Y. 581, 132 N.E.2d 852 (1956).
- 4 [Buchalter v. People of State of New York](#), 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).
- 5 [Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); [Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia](#), 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).
- 6 [Stein v. People of State of New York](#), 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, [Jackson v. Denno](#), 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)).
A mere error of state law is not a denial of due process. [Swarthout v. Cooke](#), 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011) (rejecting federal-court merits review of the application of all state-prescribed procedures in cases involving liberty or property interests).
- 7 [Donnelly v. DeChristoforo](#), 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).
- 8 [Beck v. Washington](#), 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); [Chicago Land Clearance Commission v. Darrow](#), 12 Ill. 2d 365, 146 N.E.2d 1, 68 A.L.R.2d 532 (1957); [Campbell v. St. Louis Union Trust Co.](#), 346 Mo. 200, 139 S.W.2d 935, 129 A.L.R. 316 (1940); [Ladner v. Siegel](#), 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172 (1930); [Tennessee Cent. Ry. Co. v. Pharr](#), 183 Tenn. 658, 194 S.W.2d 486 (1946).
It cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of a violation of state law with respect to the conduct of local affairs, and the contention that such a decision is erroneous does not present a federal question. [Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission](#), 309 U.S. 30, 60 S. Ct. 411, 84 L. Ed. 563 (1940).
- 9 [Doty v. Love](#), 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935) (liquidating agency of a bank).
The United States Constitution cannot feasibly be construed to require federal judicial review for all errors inevitable in the day-to-day administration of affairs by public agencies, and the Due Process Clause of the 14th Amendment is not a guarantee against incorrect or ill-advised personnel decisions. [Bishop v. Wood](#), 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).
- 10 [Bouie v. City of Columbia](#), 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).
- 11 [American Ry. Express Co. v. Commonwealth of Kentucky](#), 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639 (1927); [Ladner v. Siegel](#), 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172 (1930).
The Due Process Clause of the 14th Amendment does not enable the United States Supreme Court to review errors of state law, however material under that law. [Buchalter v. People of State of New York](#), 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).

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16B Am. Jur. 2d Constitutional Law § 964

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 964. Retrospective or prospective application of statute or judicial decision as related to substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3903, 3907

The Due Process Clause of the Fifth Amendment protects interests in fair notice and repose which may be compromised by retroactive legislation.¹ However, retroactive statutory amendments do not necessarily violate the Due Process Clause simply because they upset settled expectations.² While retroactive legislation must meet a burden not faced by legislation that has only future effects, the burden is met simply by showing that the retroactive application of the legislation itself is justified by a rational legislative purpose.³ Whether there exists a rational basis for retroactive application of statute that would deprive party of vested right involves weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect; implicit in that analysis is a consideration of the unfairness created by the retroactive legislation.⁴

The retrospective aspects of economic legislation, as well as its prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by a rational means.⁵ For example, the United States Supreme Court has found that the application of an income tax statute to the entire calendar year in which the enactment takes place does not per se violate the Due Process Clause.⁶

Observation:

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether the events predate or postdate the Supreme Court's announcement of the rule.⁷

The 14th Amendment does not make an act of legislation void merely because it has some retrospective application but, rather, forbids the taking of life, liberty, or property without due process of law, and assuming that statutes of limitations, like other types of legislation, can be so manipulated that their retroactive effects would offend the United States Constitution, the lifting of the bar of a statute of limitations to restore a remedy lost through mere lapse of time is not per se an offense against the 14th Amendment. Congress has the constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period and can constitutionally provide for the retroactive application of an extended limitations period for the filing of a complaint with a government agency.⁸

The highest court of a state, in overruling an earlier decision, may make a choice for itself whether the new rule declared by it will operate prospectively only or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.⁹ A court may give its overruling of an earlier decision a retroactive bearing, thereby making invalid that which has been valid in the doing.¹⁰

Observation:

In appropriate cases, a court may, in the interest of justice, make its ruling prospective only, and this applies in the constitutional area where the exigencies of the situation require such an application. The United States Constitution neither prohibits nor requires retrospective effect.¹¹ Although an entirely prospective change in the law may disturb the relied-upon expectations of individuals, such a change would not be deemed therefore to be violative of due process, under the United States Constitution.¹²

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Footnotes

- 1 [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016); [Landgraf v. USI Film Products](#), 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).
- 2 [In re Exide Technologies](#), 611 B.R. 21 (Bankr. D. Del. 2020).

- 3 [U.S. v. Carlton](#), 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).
The retroactive application of the Illegal Immigration Reform and Immigrant Responsibility Act provision limiting the Attorney General's discretion to grant a waiver of inadmissibility to an alien who assisted the alien's spouse or other family member to illegally enter the country to cases in which the familial relationship existed at the time of the smuggling did not violate the due-process rights of a resident alien who attempted to illegally bring his girlfriend, whom he later married, into the country on his return from a short trip to Mexico; the retroactivity limited only the alien's eligibility for discretionary relief and did not infringe on the right he possessed prior to the amendment, and Congress had a rational basis for the rule of deterring the smuggling of aliens who are not immediate family members. [Lopez De Jesus v. I.N.S.](#), 312 F.3d 155 (5th Cir. 2002).
- 4 [Nelson v. Johnson & Johnson](#), 2019 WL 7047312 (E.D. Wis. 2019).
- 5 [General Motors Corp. v. Romein](#), 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).
In evaluating a substantive due-process challenge to economic legislation, the basic test remains the same regardless of the retroactive nature of statute: whether the statute is rationally related to a legitimate legislative purpose. [Holland v. Keenan Trucking Co.](#), 102 F.3d 736 (4th Cir. 1996).
As to legitimate governmental interests and the reasonableness requirement in this regard, as well as the rational basis test, generally, see § 955.
- 6 [U. S. v. Darusmont](#), 449 U.S. 292, 101 S. Ct. 549, 66 L. Ed. 2d 513 (1981).
- 7 [Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).
- 8 [International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.](#), 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 2d 427 (1976).
- 9 [Great Northern Ry. Co. v. Sunburst Oil & Refining Co.](#), 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).
Due process is not denied by a state supreme court's reversal of a previous decision and the application of such reversal to preexisting situations. [In re Allis' Will](#), 6 Wis. 2d 1, 94 N.W.2d 226, 69 A.L.R.2d 1128 (1959).
- 10 [Great Northern Ry. Co. v. Sunburst Oil & Refining Co.](#), 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).
- 11 [Tehan v. U.S. ex rel. Shott](#), 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966).
- 12 [U.S. v. Carlton](#), 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

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16B Am. Jur. 2d Constitutional Law § 965

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 965. Persons and agencies bound by substantive due process, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3935 to 3945

The guarantee of due process of law which is stated in the Fifth Amendment binds the federal government, while that stated in the 14th Amendment binds the states,¹ and the restraint imposed upon legislation by the Due Process Clauses of the Fifth and 14th Amendments is the same.² Thus, the limitations inherent in the requirements as to due process of law are binding equally on the United States³ and on the several states.⁴

Observation:

While it is for the state courts to determine the adjective as well as the substantive law of a state, they must, in so doing, accord parties due process of law.⁵ State law may provide relief beyond the demands of federal due process but under no circumstances may it confine petitioners to a lesser remedy.⁶

The purpose of the Due Process Clause is to exclude arbitrary power from every branch of the government.⁷ The protection of the Due Process Clause protects is no less with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.⁸ The constitutional guarantees of due process, whether under the Federal or State Constitution are restraints not only upon persons holding positions specifically classed as executive, legislative, or judicial but upon all administrative and ministerial officials who act under governmental authority.⁹ The guarantee is violated whenever any person, by virtue of his or her public governmental position, deprives another of any right protected by the due-process provisions.¹⁰ The guarantee may also be violated by unfairness or corruption of officers in the performance of administrative functions.¹¹

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Footnotes

- 1 [Betts v. Brady](#), 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) (overruled on other grounds by, [Gideon v. Wainwright](#), 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)); [Massey v. Wheeler](#), 221 F.3d 1030 (7th Cir. 2000); [Smith v. Township Of East Greenwich](#), 519 F. Supp. 2d 493 (D.N.J. 2007), judgment aff'd, 344 Fed. Appx. 740 (3d Cir. 2009), as amended, (Nov. 3, 2009); [Jacobs v. City of Chariton](#), 245 Iowa 1378, 65 N.W.2d 561 (1954); [In re Appropriation for Highway Purposes](#), 104 Ohio App. 243, 4 Ohio Op. 2d 391, 148 N.E.2d 242 (9th Dist. Lorain County 1957); [Rich v. Commonwealth](#), 198 Va. 445, 94 S.E.2d 549 (1956); [Sheesley v. State](#), 2019 WY 32, 437 P.3d 830 (Wyo. 2019).
- 2 § 933.
- 3 [State Bd. of Ins. v. Todd Shipyards Corp.](#), 370 U.S. 451, 82 S. Ct. 1380, 8 L. Ed. 2d 620 (1962) (finding that Congress does not have the final say as to what constitutes due process under the 14th Amendment).
As to the Fifth Amendment Due Process Clause as applying to acts of Congress with respect to the inhabitants of a territory or possession of the United States, see [Am. Jur. 2d, States, Territories, and Dependencies](#) §§ 141, 142.
- 4 [Brown v. State of New Jersey](#), 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899).
- 5 [Richards v. Jefferson County, Ala.](#), 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
- 6 [Harper v. Virginia Dept. of Taxation](#), 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).
- 7 [Charles Tolmas, Inc. v. Police Jury of Parish of Jefferson](#), 231 La. 1, 90 So. 2d 65 (1956).
- 8 [J. McIntyre Machinery, Ltd. v. Nicastro](#), 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).
- 9 [Betts v. Easley](#), 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).
When the state creates a danger that harms someone, he or she may hold the state actor liable for depriving him or her of substantive due process. [Wheeler v. City of Philadelphia](#), 367 F. Supp. 2d 737 (E.D. Pa. 2005).
As to state and municipal agencies, departments, or officials as bound by due-process provisions, see § 966.
- 10 [Davis v. Passman](#), 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (holding that, for purposes of the Due Process Clause of the Fifth Amendment, the restraints of the amendment reach far enough to embrace the official actions of a United States Congressperson in hiring and dismissing his or her employees).
- 11 [Norris v. State of Alabama](#), 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

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16B Am. Jur. 2d Constitutional Law § 966

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 966. State and municipal agencies, departments, or officials as bound by substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3937 to 3940

A state may not, by any of its agencies, departments, or officials, whether legislative, judicial, or executive, disregard the constitutional prohibition against denying due process of law.¹ When the action complained of is legislative in nature, however, due process is satisfied when the legislative body performs its responsibilities in a normal manner prescribed by law.²

Every state official, high and low, is bound by the 14th Amendment,³ including officials of the executive⁴ and judicial⁵ departments of the state. The inhibition includes all functionaries of state government, judicial, as well as political.⁶ For example, a state university is a state actor and must comply with the terms of the Due Process Clause when the university decides to impose a serious disciplinary sanction upon one of the university's tenured employees.⁷

Likewise, the acts and practices of a commission created by a state legislature for the purpose of combating juvenile delinquency which directly and designedly stop the circulation of publications found objectionable by the commissioner are performed under color of state law and so constitute acts of the state within the meaning of the 14th Amendment.⁸ While municipalities cannot challenge state actions on federal constitutionality grounds because they are not "persons" within the meaning of the Due Process Clause,⁹ municipal ordinances adopted under state authority constitute "state action" within the prohibition of the 14th Amendment,¹⁰ as do actions of municipal and county officials.¹¹

Substantive due process under the 14th Amendment requires only that such public officials exercise professional judgment, in a nonarbitrary and noncapricious manner, when depriving an individual of a protected property interest.¹² Generally, the public official's conduct depriving the plaintiff of life, liberty, or property must be deliberate for there to be a violation, so that mere negligence is not violative of substantive due-process rights.¹³ However, under certain circumstances, deliberate indifference may be sufficient to support an allegation of culpability.¹⁴

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Footnotes

- 1 [Richards v. Jefferson County, Ala.](#), 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
In litigation involving the integration of public schools, local officials, such as members of the school board and the superintendent of schools, stand, from the point of view of the 14th Amendment, as agents of the state. [Cooper v. Aaron](#), 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 3 L. Ed. 2d 19, 79 Ohio L. Abs. 452, 79 Ohio L. Abs. 462 (1958).
Rights under the 14th Amendment turn on the power of the state, no matter by what organ it acts. [Hughes v. Superior Court of Cal. in and for Contra Costa County](#), 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).
- 2 [Halverson v. Skagit County](#), 42 F.3d 1257 (9th Cir. 1994), as amended on denial of reh'g, (Feb. 9, 1995).
As to procedural due process as requiring notice and hearing in the adoption of general legislation, see § 945.
As to legitimate governmental interests and the reasonableness requirement with regard to substantive due process, as well as the rational basis test, generally, see § 955.
- 3 [U.S. v. Raines](#), 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).
- 4 [Mandel v. Hodges](#), 54 Cal. App. 3d 596, 127 Cal. Rptr. 244, 90 A.L.R.3d 728 (1st Dist. 1976).
For the purpose of determining what is state action within the purview of the 14th Amendment, a state or city may act as authoritatively through its executive as through its legislative body. [Lombard v. State of La.](#), 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963).
- 5 [Barrows v. Jackson](#), 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); [Ex parte McCoy](#), 32 Cal. 2d 73, 194 P.2d 531 (1948); [In re Cosgrave's Will](#), 225 Minn. 443, 31 N.W.2d 20, 1 A.L.R.2d 175 (1948); [Citron v. Mangel Stores Corp.](#), 50 N.Y.S.2d 416 (Sup 1944), judgment aff'd, 268 A.D. 905, 51 N.Y.S.2d 754 (1st Dep't 1944); [Commissioners of Sinking Fund of City of Philadelphia v. City of Philadelphia](#), 324 Pa. 129, 188 A. 314, 113 A.L.R. 202 (1936).
The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. [Goodyear Dunlop Tires Operations, S.A. v. Brown](#), 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011).
The conduct of a state prosecuting attorney and a court reporter in preparing a fraudulent transcript of trial proceedings in a criminal case which transcript is used in a hearing before the highest state court to which the accused has an automatic right of appeal amounts to a denial of due process of law in violation of the 14th Amendment. [Chessman v. Teets](#), 350 U.S. 3, 76 S. Ct. 34, 100 L. Ed. 4 (1955).
- 6 [Richards v. Jefferson County, Ala.](#), 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
In determining whether a state action is violative of the Due Process Clause, it is immaterial whether the state has acted solely through its judicial branch since, whether legislative or judicial, it is still the application of state power which must be scrutinized. [National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers](#), 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1964).
- 7 [National Collegiate Athletic Ass'n v. Tarkanian](#), 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469, 50 Ed. Law Rep. 17 (1988).
- 8 [Bantam Books, Inc. v. Sullivan](#), 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963); [Juster Bros. v. Christgau](#), 214 Minn. 108, 7 N.W.2d 501 (1943).
As to due process as requiring notice and hearing in the adoption of general legislation, see § 945.
- 9 § 972.

- 10 [Carlson v. People of State of Cal.](#), 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940); [Chandler v. City of Arvada, Colorado](#), 292 F.3d 1236, 13 A.L.R.6th 861 (10th Cir. 2002).
- 11 [Walz v. Town of Smithtown](#), 46 F.3d 162 (2d Cir. 1995) (holding that homeowners' substantive as well as procedural due-process rights were violated by a town highway superintendent's denial of a street excavation permit to connect a home to the public water system as a means of extorting land from the homeowners for the widening of a street since under the town code, the superintendent had no discretion to deny the permit and the homeowners had the right not to be compelled to convey land to obtain a water utility service). A town's issuance of a certificate of occupancy of a house revoking the former conditional use as a two-family dwelling was an affirmative act revoking a prior property right in a nonconforming use, subject to a procedural due-process challenge, despite the claim that the right to a conforming use expired years previously when the house remained unoccupied for one year, after being gutted by fire. [Norton v. Town of Islip](#), 239 F. Supp. 2d 264 (E.D. N.Y. 2003), judgment aff'd, 77 Fed. Appx. 56 (2d Cir. 2003). As to the observance of due-process requirements in connection with municipal ordinances or acts, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 315](#).
- 12 [Bluitt v. Houston Independent School Dist.](#), 236 F. Supp. 2d 703 (S.D. Tex. 2002).
- 13 [Kingsley v. Hendrickson](#), 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015); [Nazelrod v. Garrett County Sanitary District, Inc.](#), 241 F. Supp. 2d 532 (D. Md. 2003).
- 14 § 970.

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16B Am. Jur. 2d Constitutional Law § 967

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 967. Congress and federal agencies as bound by substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑3936

The great substantive powers of Congress are all subject in their operation to the guarantees of due process contained in the Fifth Amendment,¹ which was intended to protect individuals from congressional power.² The amendment has been applied to restrict the powers of Congress within the limitations of due process in the exercise of the war power,³ the taxing power,⁴ the bankruptcy power,⁵ and the power to regulate commerce.⁶

An agency created jointly by contracting states is within the reach of the Due Process Clause of the Fifth Amendment.⁷ However, the due-process guarantee does not circumscribe the activities of a federal agency that is lacking in power to affect those rights which due process protects.⁸

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Footnotes

- 1 [Louisville Joint Stock Land Bank v. Radford](#), 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935).
Congress's decision to treat recidivism and, in particular, the fact that an alien is deported following his conviction of an aggravated felony merely as a sentencing factor upon the alien's subsequent conviction

of an illegal reentry offense rather than as an element of that offense did not exceed due process or other constitutional limits on Congress's power to define the elements of a crime. [Almendarez-Torres v. U.S.](#), 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

2 [In re Bernard L. Madoff Inv. Securities LLC](#), 440 B.R. 282 (Bankr. S.D. N.Y. 2010).

3 Am. Jur. 2d, War § 13.

4 [Heiner v. Donnan](#), 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (1932).

5 Am. Jur. 2d, Bankruptcy § 11.

6 [Morgan v. Com. of Va.](#), 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).

The Fifth Amendment does not require a full and uniform exercise of the commerce power, and Congress may weigh the relative needs and restrict the application of legislative policy to less than an entire field. [Mabee v. White Plains Pub. Co.](#), 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946).

7 [Jacobson v. Tahoe Regional Planning Agency](#), 566 F.2d 1353 (9th Cir. 1977), judgment aff'd in part, rev'd in part on other grounds, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979).

The Due Process Clause requires only that an alien allegedly subject to removal must receive notice and a fair hearing at which the Immigration and Naturalization Service (INS) must prove by clear, unequivocal, and convincing evidence that the alien is subject to deportation. [Cervantes-Ascencio v. U.S. I.N.S.](#), 326 F.3d 83 (2d Cir. 2003).

8 [Hannah v. Larche](#), 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).

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16B Am. Jur. 2d Constitutional Law § 968

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 968. Private persons as bound by substantive due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941, 3942

It is the established general rule that the provisions of the Due Process Clauses in a state constitution and in the United States Constitution are inhibitions upon the powers of governments and their agencies, not upon freedom of action of private persons,¹ including corporations.² Nothing in the language of the Due Process Clause requires a state to protect the life, liberty, and property of its citizens against invasion by private actors.³ Thus, the 14th Amendment itself erects no shield against merely private conduct, however discriminatory or wrongful.⁴

On the other hand, a violation of the due-process guarantee may result from the interplay of governmental and private action where it appears that it is only after the initial exertion of state power that private action takes hold.⁵ Although the Due Process Clause of the 14th Amendment protects a property interest only from deprivation by state action and the private use of state-sanctioned private remedies or procedures does not rise to the level of state action, when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.⁶ The test for determining "state action" is whether or not there is significant state involvement in the private conduct warranting the application of constitutional due process; that action must proximately result in the injury which is the subject of the complaint.⁷ In other words, where the government has become so entangled in the actions of a private party, it may warrant the requirement that such private conduct conform to the constitutional standards of behavior.⁸ Under other authority, the test to determine whether a private citizen has

become a state actor for purposes of the Fifth Amendment requires consideration of two factors: (1) whether the government has knowledge of and acquiesces in the activity, and (2) the intent of the party performing the activity.⁹

Observation:

The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Due Process Clause of the 14th Amendment,¹⁰ nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities. Although acts of a heavily regulated business entity may more readily be found to be "state" acts than will be acts of an entity lacking such characteristics; nevertheless the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.¹¹

All state-regulated businesses affected with a public interest are not "state actors" in all their actions for purposes of the Due Process Clause of the 14th Amendment.¹² Moreover, the United States Supreme Court has indicated that the 14th Amendment does not apply to a private entity merely because that entity has a monopoly under state law.¹³

Observation:

The threshold question in any judicial inquiry into conduct claimed to be violative of the 14th Amendment is whether the state has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity. Purely private conduct does not rise to the level of constitutional significance, absent a significant nexus between the state and the actors or the conduct. This nexus which has been denominated "state action" is an essential requisite to any action grounded on a deprivation of due process of law. Furthermore, where the impetus for the allegedly unconstitutional conduct is private, the state must have significantly involved itself for that action to fall within the ambit of the 14th Amendment.¹⁴

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Footnotes

- 1 [Tulsa Professional Collection Services, Inc. v. Pope](#), 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); [Siefert v. Hamilton County](#), 951 F.3d 753 (6th Cir. 2020); [Doe v. University of Denver](#), 952 F.3d 1182 (10th Cir. 2020); [Natarajan v. Dignity Health](#), 42 Cal. App. 5th 383, 254 Cal. Rptr. 3d 887 (3d Dist. 2019), as modified on denial of reh'g, (Nov. 20, 2019) and review granted, see [cal. rules of court 8.1105](#) and [8.1115](#), 259 Cal. Rptr. 3d 195, 459 P.3d 1 (Cal. 2020); [People v. Wakefield](#), 2018 COA 37, 428 P.3d 639 (Colo. App. 2018), cert. denied, 2018 WL 4941723 (Colo. 2018); [Hood v. Com.](#), 448 S.W.2d 388 (Ky. 1969); [Grinnell](#)

Mut. Reinsurance Co. v. Walters, 194 S.W.3d 830 (Mo. 2006); *Collazo v. Hicksville Union Free School District*, 65 Misc. 3d 268, 108 N.Y.S.3d 708, 370 Ed. Law Rep. 1023 (Sup 2019).

The due-process provision of the Florida Constitution requires state action before becoming applicable. *Snipes v. State*, 733 So. 2d 1000 (Fla. 1999).

Ordower v. Office of Thrift Supervision, 999 F.2d 1183 (7th Cir. 1993).

A contractor which had contracted with the federal government to operate a plant was not a "federal actor" subject to suit for pension benefits brought under the Due Process Clause by retired plant employees since the contractor was a private corporation. *Edwards v. U.S., Dept. of Energy*, 371 F. Supp. 2d 859 (W.D. Ky. 2005), judgment aff'd, 200 Fed. Appx. 382, 2006 FED App. 0577N (6th Cir. 2006).

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

The Due Process Clause applies only to governmental deprivations of life, liberty, or property and thus provides no guarantee of government protection from harms caused by private parties. *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71 (1st Cir. 2005).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004); *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679 (D. Md. 2001), judgment aff'd, 313 F.3d 205 (4th Cir. 2002).

National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) (finding that a state's limited involvement in the mere running of the period of a self-executing statute of limitations where the state's interest in such a statute is in providing repose for potential defendants and in avoiding stale claims and where the state has no role to play beyond the enactment of the limitations period does not constitute the type of state action required to implicate the protections of the Due Process Clause).

Gotsis v. Lorain Community Hospital, 46 Ohio App. 2d 8, 75 Ohio Op. 2d 18, 345 N.E.2d 641 (9th Dist. Lorain County 1974).

All that is necessary to determine if an entity is a state actor for due-process purposes is to evaluate the nature and extent of state involvement so as to determine if its actions are fairly attributable to the state. *Zaleski v. West Virginia Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007).

Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, Connecticut, 514 F.2d 285 (2d Cir. 1975).

State v. Sanders, 452 S.W.3d 300 (Tenn. 2014).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *McCarthy v. Middle Tennessee Elec. Membership Corp.*, 466 F.3d 399, 2006 FED App. 0378P (6th Cir. 2006).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (finding that a state utility commission's approval of a private utility's proposed business practice, as required by state law, did not transmute the utility's business practice into "state action" for purposes of the Due Process Clause of the 14th Amendment, where the commission had not put its own weight on the side of the proposed practice by ordering it, the initiative for the proposed practice coming from the utility rather than the state; at most, the commission's failure to overturn the practice amounted to no more than a determination that the utility was authorized to employ such practice if it so desired).

To transform actions of private parties into those of the federal government, the government must be involved with the activity that causes the actual injury, and it is not enough to show that the government heavily regulates the party whose activities are challenged. *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (holding that while doctors, optometrists, lawyers, electric utility companies, and grocers are all in state-regulated businesses providing arguably essential goods and services affected with a public interest, nevertheless such a status, absent more, does not convert their every action into that of the state for purposes of the Due Process Clause of the 14th Amendment).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Mays v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 2002 FED App. 0028P (6th Cir. 2002).

Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 969. Private persons as bound by substantive due process—Specific private persons or organizations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3941 to 3945

As examples of the principles regarding the application of the due-process limitations upon the powers of governments and their agencies and not upon private persons,¹ specific private persons and organizations that have been found not subject to the Due Process Clauses because they are not "state actors" have included:

- a private accreditation agency that made the decision to remove accreditation from a college²
- a testing service whose standardized test is a prerequisite to admission to nearly all law schools³
- a nuclear power plant owner and operator⁴
- a military contractor⁵
- an automobile insurer⁶
- a private charitable organization which provided financial assistance and a variety of other services to refugees seeking to emigrate to the United States⁷

- a volunteer first-aid squad which treated a person injured during an arrest by a police officer⁸
- a private university⁹
- the National Collegiate Athletic Association (NCAA)¹⁰
- a private moneylender¹¹
- a wife in a domestic violence case¹²
- a railroad which conducted a grievance proceeding following dismissal of a railroad employee¹³
- a transport workers union¹⁴
- a state-chartered mutual savings and loan association¹⁵
- an Indian tribe exercising police powers¹⁶
- private security officers hired by concert promoters to conduct preconcert pat-down searches at a public university auditorium¹⁷

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Footnotes

- 1 § 968.
- 2 *Hiwassee College, Inc. v. Southern Association Of Colleges And Schools*, 531 F.3d 1333, 234 Ed. Law Rep. 595 (11th Cir. 2008).
- 3 *Johnson v. Educational Testing Service*, 754 F.2d 20, 37 Ed. Law Rep. 30 (1st Cir. 1985).
- 4 *Baldwin v. Pilgrim Nuclear Power Station*, 529 F. Supp. 2d 204 (D. Mass. 2008).
- 5 *James v. ServiceSource, Inc.*, 555 F. Supp. 2d 628 (E.D. Va. 2008).
- 6 *Vintilla v. Safeco Ins. Co.*, 417 F. Supp. 2d 922 (N.D. Ohio 2006), decision aff'd, 219 Fed. Appx. 413, 2007 FED App. 0175N (6th Cir. 2007).
- 7 *Nguyen v. U.S. Catholic Conference*, 719 F.2d 52 (3d Cir. 1983).
- 8 *Groman v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995).
- 9 *Doe v. University of Denver*, 952 F.3d 1182 (10th Cir. 2020); *Doe v. Allee*, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109, 361 Ed. Law Rep. 814 (2d Dist. 2019).
- 10 *Arlosoroff v. National Collegiate Athletic Ass'n*, 746 F.2d 1019, 20 Ed. Law Rep. 1120 (4th Cir. 1984).
- 11 *Rank v. Nimmo*, 677 F.2d 692 (9th Cir. 1982); *Faith Cathedral Church of God in Christ v. Booker T. Washington Ins. Co., Inc.*, 481 So. 2d 369 (Ala. 1985).
A credit union which allegedly transferred money from its customers' account without their consent was not a state actor for purposes of the customer's claim for a violation of due process under the 14th Amendment.
- 12 *Smith v. Delaware First Federal Credit Union*, 395 F. Supp. 2d 127 (D. Del. 2005).
- 13 *Kelm v. Hyatt*, 44 F.3d 415, 1995 FED App. 0025P (6th Cir. 1995).
- 14 *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94 (7th Cir. 1986).
- 15 *Carter v. Transport Workers Union of America Local 556*, 353 F. Supp. 3d 556 (N.D. Tex. 2019).
- 16 *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418 (9th Cir. 1994).
- 17 *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).
- 18 *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 98 Ed. Law Rep. 639 (10th Cir. 1995).

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16B Am. Jur. 2d Constitutional Law § 970

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Constitutional Law

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 970. Persons protected by substantive due process, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3920 to 3932

The guarantee of due process of law inures to the benefit of persons who are citizens of the United States or of the state in which the question arises.¹ It is not, however, limited to such citizens. Instead, the guarantee is universal in its application to all persons within the territorial jurisdiction of a state or the United States without regard to any differences of race, color, or nationality² when they have come within the territory of the United States and developed substantial connections with this country.³ By their terms, federal and state constitutional guarantees of due process extend to "persons."⁴

The Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security for those persons it protects. It forbids the state to deprive an individual's life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.⁵ There are two exceptions, however, to the general rule that the state is not constitutionally obligated under the Due Process Clause to protect individuals against private violence,⁶ and they are (1) the special-relationship doctrine,⁷ and (2) the state-created or enhanced danger doctrine,⁸ under which the Due Process Clause imposes a duty on the state to protect the plaintiff from third parties when the state affirmatively places the plaintiff in danger.⁹ That is, exceptions to the rule apply when (1) a state has custody of a person in need or some other "special relationship" that heightens its responsibility to care for a particular citizen, or (2) when a state actor acts affirmatively to create or greatly increases a risk of harm to citizens.¹⁰ An affirmative duty on the part of a state actor to protect arises not from knowledge of

an individual's predicament or from expressions of intent to help him or her,¹¹ but from the limitations such as imprisonment, institutionalization, or other similar restraint of personal liberty imposed by the state which prevent an individual from acting on his own behalf.¹² Generally, to establish a substantive due-process violation under the state-created danger doctrine, plaintiffs must establish that (1) the harm ultimately caused to plaintiff was foreseeable and fairly direct, (2) the state actor acted in willful disregard for the plaintiff's safety, (3) there was some relationship between the state and the plaintiff, and (4) the state actor used his or her authority to create an opportunity for danger that otherwise would not have existed.¹³ Under a different formulation of the rule, to establish the state-created danger exception, plaintiff must show that (1) the charged state actors created the danger or increased the plaintiff's vulnerability to the danger in some way; (2) the plaintiff was a member of a limited and specifically definable group; (3) the defendants' conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) the defendants acted recklessly in conscious disregard of that risk; and (6) the conduct, when viewed in total, shocks the conscience.¹⁴

Observation:

It has been said that the level of culpability required to sustain a due-process claim based on a state-created danger theory depends on the particular circumstances of the case; where state officials are asked to make split-second decisions in a hyperpressurized environment, an intent to cause harm is usually required. By contrast, where officials are afforded the luxury of a greater degree of deliberation and have time to make unhurried judgments, *deliberate indifference* is sufficient to support an allegation of culpability.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

To prove a due process claim under state-created-danger exception to the prohibition against holding public officials constitutionally responsible for private acts of violence, an official must initially take an affirmative act that either creates or increases the risk that the plaintiff will be exposed to private acts of violence, the risk of private acts of violence must rise to the level of a special danger to a specific victim that exceeds the general risk of harm the public faces from the private actor, and, when exacerbating this risk of harm, the official must act with a sufficiently culpable state of mind. [U.S. Const. Amend. 14. Barefield v. Hillman, 475 F. Supp. 3d 794 \(M.D. Tenn. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [In re Schott, 16 Ohio App. 2d 72, 45 Ohio Op. 2d 168, 241 N.E.2d 773 \(1st Dist. Hamilton County 1968\).](#)
- 2 [Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 \(1953\).](#)
The Due Process Clauses of the Fifth and 14th Amendments are directed at the protection of the individual, and he or she is entitled to the immunity that these clauses give as much against the state as against the

- national government. [Curry v. McCanless](#), 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).
- 3 [U.S. v. Verdugo-Urquidez](#), 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).
All individuals in the United States, citizens and aliens alike, are protected by the Due Process Clause. [U.S. v. Calderon-Segura](#), 512 F.3d 1104, 75 Fed. R. Evid. Serv. 647 (9th Cir. 2008).
A citizen of a foreign state without property or presence in this country has no constitutional rights under the Due Process Clause or otherwise; however, aliens who have come within the territory of the United States and developed substantial connections with this country are entitled to constitutional protections. [Al-Aqeel v. Paulson](#), 568 F. Supp. 2d 64 (D.D.C. 2008).
- 4 [South Carolina v. Katzenbach](#), 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (noting that a state of the United States is not a "person" for the purposes of the due-process guarantee of the Fifth Amendment).
As to the protection provided to states and political subdivisions, generally, see § 972.
- 5 [Collins v. City of Harker Heights, Tex.](#), 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); [Neiberger v. Hawkins](#), 239 F. Supp. 2d 1140 (D. Colo. 2002).
- 6 [Niziol v. Pasco County Dist. School Bd.](#), 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).
For purposes of the private violence requirement of a state-created danger claim under the Fourteenth Amendment, at a minimum, the term "violence" in its legal sense typically connotes some degree of deliberateness. [Kerns v. Independent School Dist. No. 31 of Ottawa County](#), 44 F. Supp. 3d 1110, 314 Ed. Law Rep. 437 (N.D. Okla. 2014).
- 7 [Niziol v. Pasco County Dist. School Bd.](#), 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).
A special relationship between an ex-wife and a county did not arise under due-process principles when the ex-wife obtained an ex parte order of protection against her ex-husband so as to create a duty on the part of the county to protect the ex-wife from her ex-husband in that the county did not act affirmatively to restrain the ex-wife from acting for herself; therefore, the failure of the county sheriff's department to serve the ex-husband with the order in a timely manner did not violate the substantive due-process rights of the ex-wife, who suffered serious injury when her ex-husband shot her. [Jones v. Union County, TN](#), 296 F.3d 417, 2002 FED App. 0235P (6th Cir. 2002).
- 8 [Niziol v. Pasco County Dist. School Bd.](#), 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).
- 9 [Henry A. v. Willden](#), 678 F.3d 991 (9th Cir. 2012).
The Due Process Clause protects against deliberately wrongful government decisions rather than merely negligent government conduct. [Saenz v. Lovington Mun. School Dist.](#), 105 F. Supp. 3d 1271, 324 Ed. Law Rep. 910 (D.N.M. 2015).
- 10 [Vidovic v. Mentor City School Dist.](#), 921 F. Supp. 2d 775, 294 Ed. Law Rep. 906 (N.D. Ohio 2013).
- 11 [O'Grady v. City of Ballwin](#), 866 F. Supp. 2d 1073 (E.D. Mo. 2012).
- 12 [Connor B. ex rel. Vigurs v. Patrick](#), 774 F.3d 45 (1st Cir. 2014); [O'Grady v. City of Ballwin](#), 866 F. Supp. 2d 1073 (E.D. Mo. 2012).
- 13 [Customers Bank v. Municipality of Norristown](#), 942 F. Supp. 2d 534 (E.D. Pa. 2013), *aff'd*, 563 Fed. Appx. 201 (3d Cir. 2014).
For a generally similar but more elaborate statement of these elements, see [Moore v. Richman](#), 797 F. Supp. 2d 572 (W.D. Pa. 2011).
- 14 [Harper v. Carbon County School Dist.](#), 105 F. Supp. 3d 1317, 324 Ed. Law Rep. 956 (D. Utah 2015).
- 15 [Van Orden v. Borough of Woodstown](#), 5 F. Supp. 3d 676 (D.N.J. 2014).

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16B Am. Jur. 2d Constitutional Law § 971

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Constitutional Law

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 971. Particular persons as protected by substantive due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3920 to 3932

In terms of the application of the Due Process Clauses to specific individuals or entities, due-process protection extends to:

- aliens¹ present in the United States,² whether their presence is lawful, unlawful, temporary, or permanent³
- attorneys⁴
- indigents⁵
- licensees⁶
- mental incompetents⁷
- military personnel⁸
- minors⁹
- parolees¹⁰

- pretrial detainees¹¹
- prisoners,¹² although the protection extended to them is significantly less than that guaranteed to free persons¹³
- private associations or societies and their members¹⁴
- private corporations¹⁵
- public employees,¹⁶ with certain exceptions¹⁷
- tenants¹⁸

On the other hand, as used in the 14th Amendment, the word "person" does not include the unborn.¹⁹ In addition, foreign states are not "persons" protected by the Fifth Amendment.²⁰ Similarly, Mexican state-owned banks are not "persons" within the scope of the Due Process Clause.²¹

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Footnotes

- 1 [Zadvydas v. Davis](#), 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); [Ezeagwuna v. Ashcroft](#), 325 F.3d 396 (3d Cir. 2003); [Capric v. Ashcroft](#), 355 F.3d 1075 (7th Cir. 2004); [Padilla v. Immigration and Customs Enforcement](#), 953 F.3d 1134 (9th Cir. 2020).
The Fifth Amendment entitles aliens to due process of law in deportation proceedings, and detention during such proceedings is a constitutionally valid aspect of the deportation process. [Demore v. Kim](#), 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).
- 2 [Padilla v. Immigration and Customs Enforcement](#), 953 F.3d 1134 (9th Cir. 2020).
Cuban migrants who found temporary sanctuary on an abandoned lighthouse off the shore of Florida were not "present" in the United States under the Immigration and Nationality Act (INA), and thus the Due Process Clause did not apply to them, since the lighthouse did not constitute dry land under the INA, for which the migrants' presence on would have rendered them applicants for admission. [Movimiento Democracia, Inc. v. Secretary, Department of Homeland Security](#), 720 Fed. Appx. 545 (11th Cir. 2017).
- 3 [K.M.H.C. v. Barr](#), 2020 WL 614035 (S.D. Cal. 2020); [Basank v. Decker](#), 2020 WL 1481503 (S.D. N.Y. 2020).
- 4 [In re Ruffalo](#), 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); [Spevack v. Klein](#), 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).
Because of the severity of the sanctions available for violations of the disciplinary rules, an attorney's due-process rights must be carefully balanced against the importance of the public interest in expeditiously resolving complaints of misconduct. [Disciplinary Counsel v. Heiland](#), 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).
As to notice and an opportunity to be heard in disciplinary proceedings against an attorney, generally, see [Am. Jur. 2d, Attorneys at Law § 105](#).
- 5 [Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
An individual receiving federal welfare assistance has a statutorily created property interest, for purposes of the Due Process Clause, in the continued receipt of those benefits. [American Mfrs. Mut. Ins. Co. v. Sullivan](#), 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).
- 6 [Club Misty, Inc. v. Laski](#), 208 F.3d 615 (7th Cir. 2000) (liquor license).
- 7 [Addington v. Texas](#), 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); [Wyatt v. Aderholt](#), 503 F.2d 1305 (5th Cir. 1974); [Com. v. Travis](#), 372 Mass. 238, 361 N.E.2d 394 (1977).

The state's requiring an insanity acquittee to prove both a lack of present mental illness and dangerousness in order to obtain unconditional release violated the substantive protections of the Due Process Clause. *Revels v. Sanders*, 519 F.3d 734 (8th Cir. 2008).

Due process of law is violated if the state or federal governments try as a criminal a person who is insane and incompetent to stand trial. *Bishop v. U.S.*, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956); *U. S. ex rel. Rizzi v. Follette*, 367 F.2d 559 (2d Cir. 1966).

Sanity hearings will violate due process of law when they are not procedurally fair to the accused. *People v. Bender*, 20 Ill. 2d 45, 169 N.E.2d 328 (1960).

Am. Jur. 2d, Military and Civil Defense § 208.

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 1999 FED App. 0162P (6th Cir. 1999); *In re Roger S.*, 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977); *In re K.M.*, 2018 IL App (1st) 172349, 426 Ill. Dec. 930, 117 N.E.3d 347 (App. Ct. 1st Dist. 2018); *In re T.M.*, 2016-Ohio-8425, 78 N.E.3d 349 (Ohio Ct. App. 11th Dist. Geauga County 2016); *In re F.C. III*, 607 Pa. 45, 2 A.3d 1201 (2010).

As to the due-process protection afforded minors with respect to juvenile court statutes, see *Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children* § 17.

Hamilton v. Keiter, 16 Ohio Misc. 260, 45 Ohio Op. 2d 285, 241 N.E.2d 296 (C.P. 1968) (holding that a convicted parolee is a person within the 14th Amendment regardless of his or her status as a citizen and is entitled to the protection of the Due Process Clause).

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Mosher v. Nelson*, 589 F.3d 488 (1st Cir. 2009); *Ford v. Nassau County Executive*, 41 F. Supp. 2d 392 (E.D. N.Y. 1999).

Under the Due Process Clause of the 14th Amendment, a city was required to provide to a pretrial detainee humane conditions of confinement by ensuring the basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee his safety. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183 (10th Cir. 2003).

Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Scruggs v. Jordan*, 485 F.3d 934 (7th Cir. 2007); *Felton v. Lincoln*, 429 F. Supp. 2d 226 (D. Mass. 2006); *Briggs v. Kempf*, 146 Idaho 172, 191 P.3d 250 (Ct. App. 2008).

A reasonable entitlement of prison inmates to due-process protection is not created whenever a state provides for the possibility of release upon parole, the possibility providing no more than a mere hope that the benefit will be obtained, but the expectancy of release provided in a state statute mandating the release of an eligible inmate unless the state parole board concludes that the inmate's release should be deferred for at least one of four specified reasons is entitled to some measure of protection under the Due Process Clause of the 14th Amendment. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

The denial or undue restriction of the fundamental right of reasonable access to the courts is a denial of due process of law guaranteed to state prison inmates by the 14th Amendment. *People v. Wells*, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (3d Dist. 1968) (disapproved of on other grounds by, *People v. Barnum*, 29 Cal. 4th 1210, 131 Cal. Rptr. 2d 499, 64 P.3d 788 (2003)).

Estate of DiMarco v. Wyoming Dept. of Corrections, Div. of Prisons, 473 F.3d 1334 (10th Cir. 2007).

While inmates retain rights under the Due Process Clause of the United States and Kentucky Constitutions, a defendant in a prison disciplinary proceeding is not entitled to the full panoply of rights due a defendant in a criminal proceeding. *Lee v. Haney*, 517 S.W.3d 500 (Ky. Ct. App. 2017).

Am. Jur. 2d, Associations and Clubs § 21.

Am. Jur. 2d, Corporations § 66.

Brown v. City of Niota, Tenn., 214 F.3d 718, 2000 FED App. 0180P (6th Cir. 2000); *Humberson v. U.S. Attorney's Office for Dist. of Columbia*, 236 F. Supp. 2d 28 (D.D.C. 2003), *aff'd*, 2003 WL 21768064 (D.C. Cir. 2003); *Moreland v. Miami-Dade County*, 255 F. Supp. 2d 1304 (S.D. Fla. 2002); *Cinaglia v. Levin*, 258 F. Supp. 2d 390 (D.N.J. 2003); *Munno v. Town of Orangetown*, 391 F. Supp. 2d 263 (S.D. N.Y. 2005); *Medina Diaz v. Gonzalez Rivera*, 371 F. Supp. 2d 77 (D.P.R. 2005); *Mays v. City of Los Angeles*, 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008); *Orix Capital Markets, LLC v. American Realty Trust, Inc.*, 356 S.W.3d 748 (Tex. App. Dallas 2011) (judges).

- 17 [Bolduc v. Town of Webster](#), 629 F. Supp. 2d 132 (D. Mass. 2009).
- 18 [Thomas v. Cohen](#), 304 F.3d 563, 2002 FED App. 0287P (6th Cir. 2002) (holding that tenants had a due-process right to predeprivation process prior to eviction, even if postdeprivation remedies were available under state law, absent a showing of exigent circumstances that made the predeprivation process impractical).
- 19 [Roe v. Wade](#), 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); [Morrow v. Clifford](#), 502 F.2d 1066 (3d Cir. 1974); [Coe v. County of Cook](#), 162 F.3d 491 (7th Cir. 1998).
- 20 [Waldman v. Palestine Liberation Organization](#), 835 F.3d 317 (2d Cir. 2016), cert. denied, 138 S. Ct. 1438, 200 L. Ed. 2d 716 (2018); [Livnat v. Palestinian Authority](#), 851 F.3d 45 (D.C. Cir. 2017), cert. denied, 139 S. Ct. 373, 202 L. Ed. 2d 301 (2018).
- 21 [Cruz v. U.S.](#), 387 F. Supp. 2d 1057 (N.D. Cal. 2005).

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16B Am. Jur. 2d Constitutional Law § 972

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 972. States and political subdivisions as protected by substantive due process

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3928 to 3930

Although there is some authority referring to the rights of a state under the Due Process Clause,¹ the Supreme Court and other courts have expressly acknowledged that a state is not a "person" for the purposes of the Due Process Clause of the Fifth Amendment.² Likewise, municipalities are not persons possessed of rights under the Due Process Clause.³ Generally, so far as the state and its instrumentalities are concerned, there is no scope for invoking the due-process guarantee as against the action of the state itself.⁴ However, in the application of this rule to municipalities, the question depends upon the view taken in the particular jurisdiction as to the rights of a municipal government; in a majority of states, the right of the people of a municipality to control its affairs is not considered as an inherent right residing in the people but as dependent for its existence on the legislative will.⁵ In such jurisdictions, the state has a power over the rights and properties of municipalities which is unrestricted by the due-process guarantee.⁶ The same rule applies to townships⁷ and to counties.⁸

In jurisdictions in which the right to local self-government is treated as a right inherent in cities and towns and one which, if not surrendered on the adoption of the state constitution, cannot be taken away by the legislature, the due-process guarantee may apply to municipal corporations, at least as to their proprietary functions.⁹ The right of home rule by cities has been established in a number of states by constitutional provision.¹⁰ A home-rule city is protected by the due-process guarantee.¹¹

CUMULATIVE SUPPLEMENT

Cases:

A county has no constitutional right to due process. [U.S. Const. Amend. 14](#). [In re Claim of Roberts for Attorney Fees](#), 307 Neb. 346, 949 N.W.2d 299 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [State, by Peterson v. Anderson](#), 220 Minn. 139, 19 N.W.2d 70 (1945) (finding that the state has a due-process right to interpose and file answers alleging that there was no taking of or damage to the land of persons permitted to intervene in condemnation proceeding instituted by the state).
- 2 [South Carolina v. Katzenbach](#), 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966); [Connecticut Dept. of Social Services v. Leavitt](#), 428 F.3d 138 (2d Cir. 2005); [State of Pa. v. Riley](#), 84 F.3d 125, 109 Ed. Law Rep. 614 (3d Cir. 1996); [Premo v. Martin](#), 119 F.3d 764 (9th Cir. 1997); [State of Ala. v. U.S. E.P.A.](#), 871 F.2d 1548 (11th Cir. 1989).
Due process protects individuals, not the state, from arbitrary governmental restrictions on property and liberty interests. [People In Interest of A.C.E.D.](#), 2018 COA 157, 433 P.3d 153 (Colo. App. 2018).
- 3 [City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill.](#), 986 F.2d 1142, 24 Fed. R. Serv. 3d 1383 (7th Cir. 1993); [Taha v. Bucks County Pennsylvania](#), 408 F. Supp. 3d 628 (E.D. Pa. 2019); [State v. City of Birmingham](#), 2019 WL 6337424 (Ala. 2019).
- 4 [Bibb County v. Hancock](#), 211 Ga. 429, 86 S.E.2d 511 (1955); [City of Gary v. Smith & Wesson Corp.](#), 126 N.E.3d 813 (Ind. Ct. App. 2019), transfer denied, 138 N.E.3d 953 (Ind. 2019); [C.S. v. J.C.](#), 2017-Ohio-8794, 101 N.E.3d 84 (Ohio Ct. App. 12th Dist. Fayette County 2017) (county family services department); [State, Department of Game, Fish and Parks v. Troy Township, Day County](#), 2017 SD 50, 900 N.W.2d 840 (S.D. 2017).
Political subdivisions of the state may not challenge the validity of a state statute under the 14th Amendment. [City of New York v. Richardson](#), 473 F.2d 923 (2d Cir. 1973).
A governmental agency which is not authorized to hold property in a private sense is not deprived of property without due process of law by a statute providing for the extinguishment of its title to land. [Fahey v. O'Melveny & Myers](#), 200 F.2d 420 (9th Cir. 1952).
- 5 [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions](#) § 107.
- 6 [City of Trenton v. State of New Jersey](#), 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923) (interference with the right of a municipality to take water from a public stream).
- 7 [Soliah v. Heskin](#), 222 U.S. 522, 32 S. Ct. 103, 56 L. Ed. 294 (1912).
- 8 [White v. White](#), 293 Neb. 439, 884 N.W.2d 1 (2016); [State v. Pierce County](#), 132 Wash. 155, 231 P. 801, 46 A.L.R. 594 (1925).
A county could not challenge as vague, under the Due Process Clause, a statute that required competitive bidding on contracts of more than \$5,000 in counties within a certain size range with charter governments; political subdivisions, such as counties, are not persons within the protection of the Due Process Clause. [Jackson County v. State](#), 207 S.W.3d 608 (Mo. 2006).
Neither counties nor municipal corporations are persons as against the state within the meaning of the constitutional provision guaranteeing due process to all persons. [Bibb County v. Hancock](#), 211 Ga. 429, 86 S.E.2d 511 (1955).
The state may impose upon a county the cost of maintaining its harmless insane when the insane persons themselves or their relatives are not able to do so even though the county is not made a party to the

proceedings in which the necessary facts are determined. [Town of Brighton v. Town of Charleston](#), 114 Vt. 316, 44 A.2d 628 (1945).

9 [State ex rel. Kern v. Arnold](#), 100 Mont. 346, 49 P.2d 976, 100 A.L.R. 1071 (1935); [People ex rel. Rodgers v. Coler](#), 166 N.Y. 1, 59 N.E. 716 (1901).

10 [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 108.](#)

11 [State ex rel. City of Missoula v. Holmes](#), 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581 (1935) (holding that a statute making it compulsory upon cities and towns to ensure their public buildings and property in a state insurance fund violates the due process and home-rule provisions of the state constitution).

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16B Am. Jur. 2d Constitutional Law XIV C Refs.

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XIV. Due Process of Law

C. Notice

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Research References

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3878 to 3881, 3953, 3973 to 3978

A.L.R. Library

A.L.R. Index, Due Process

A.L.R. Index, Fifth Amendment

A.L.R. Index, Fourteenth Amendment

A.L.R. Index, Notice or Knowledge

West's A.L.R. Digest, [Constitutional Law](#)  3878 to 3881, 3953, 3973 to 3978

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16B Am. Jur. 2d Constitutional Law § 973

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XIV. Due Process of Law

C. Notice

1. In General

§ 973. Necessity of notice as element of due process, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3878 to 3881, 3953, 3973 to 3978

As a matter of due process, parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified.¹ Consequently, notice is an essential element of due process² and the failure to give notice violates the most rudimentary demands of due process of law³ inasmuch as the right to be heard, ensured by the guarantee of due process, has little reality or worth unless one is informed that a matter is pending and can choose whether to appear or default, acquiesce, or contest.⁴

Observation:

A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful⁵ and to prevent arbitrary or unfair deprivations.⁶ Specifically, the purpose of the notice requirement of due process is to apprise interested parties of the pendency of the action,⁷ to permit adequate preparation for the impending hearing,⁸ to state the time, place, and purpose of the hearing to persons entitled to notice so that parties may attend the hearing,⁹ and to afford them an opportunity to present their objections.¹⁰

The Due Process Clause requires at a minimum that any deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case.¹¹ The procedural due process requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions but the fair process of decision making that such requirement guarantees works, by itself, to protect against any arbitrary deprivation of property.¹² The due process requirement of the 14th Amendment as to notice do not depend on the classification of actions as in rem or in personam.¹³ A violation of a person's right of due process by failing to give him or her notice of the pendency of proceedings is not cured by granting the person a hearing on his or her motion to set aside the decree.¹⁴

Absent some exigent or other extraordinary circumstances, a court may not award equitable relief without first providing all affected parties actual notice that it is contemplating a remedial action and affording them a meaningful chance to be heard; the fact that a court enjoys broad discretion in shaping solutions does not relieve it from its obligation to afford procedural due process to all parties in interest.¹⁵ This is especially true in proceedings of a judicial nature affecting the property rights of citizens;¹⁶ some form of notice and hearing is required.¹⁷ Notice and an opportunity to be heard are also essential on the basis of procedural due process where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him or her,¹⁸ although reputation alone is not an interest protected by the Due Process Clause.¹⁹

Practice Tip:

The United States Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.²⁰

A court violates a party's due process rights by expanding the scope of a hearing without proper notice.²¹

Generally, due process requires notice of certain proceedings after the initiation of a lawsuit.²²

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Footnotes

- 1 [BMW of North America, Inc. v. Gore](#), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); [In re DeLeon J.](#), 290 Conn. 371, 963 A.2d 53 (2009); [Smith v. State](#), 297 Ga. App. 300, 676 S.E.2d 750 (2009), judgment aff'd, 286 Ga. 409, 688 S.E.2d 348 (2010).
Hearing, generally, see §§ 987 to 1017.

Procedural due process requires an opportunity to be heard, in addition to notice of the pendency of an action, and in conjunction therewith, adequate notice of the hearing is fundamental. *Dehart v. Jones*, 269 So. 3d 801 (La. Ct. App. 3d Cir. 2019).

A state court's holding that a default judgment must stand absent a showing of a meritorious defense where the judgment was entered without proper notice and with substantial adverse consequences to the party in default, is infirm under the Due Process Clause of the 14th Amendment. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988).

2 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594 (1st Cir. 1995); *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235 (3d Cir. 1996); *McDonald v. City of Corinth, Tex.*, 102 F.3d 152 (5th Cir. 1996); *Arch of Kentucky, Inc. v. Director, Office of Workers' Compensation Programs*, 556 F.3d 472 (6th Cir. 2009); *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453 (8th Cir. 1996); *Martinez v. McAleenan*, 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019) (key element); *Bluitt v. Houston Independent School Dist.*, 236 F. Supp. 2d 703 (S.D. Tex. 2002); *Doe v. California Dept. of Justice*, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009); *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009); *In re Robert S.*, 2009 ME 18, 966 A.2d 894 (Me. 2009); *Burns v. State*, 2019 OK CR 27, 453 P.3d 1244 (Okla. Crim. App. 2019) (basic requirement); *Davis v. Blumenstein*, 7 Wash. App. 2d 103, 432 P.3d 1251 (Div. 1 2019).

The right of prior notice is central to the United States Constitution's command of due process. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure as required under procedural due process. *Matter of Duvall*, 834 S.E.2d 177 (N.C. Ct. App. 2019).

3 *Franzblau Dratch, PC v. Martin*, 452 N.J. Super. 486, 175 A.3d 973 (App. Div. 2017); *Interest of T.M.E.*, 565 S.W.3d 383 (Tex. App. Texarkana 2018).

4 *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); *Martinez v. McAleenan*, 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019); *Sapp v. Wilkie*, 32 Vet. App. 125 (2019); *In re Marriage of Burns and Lifferth*, 2019 IL App (2d) 180715, 431 Ill. Dec. 867, 128 N.E.3d 1037 (App. Ct. 2d Dist. 2019).

The right to a hearing is meaningless without notice. *Jackson v. Commissioner of Human Services*, 933 N.W.2d 408 (Minn. 2019).

In the absence of effective notice, the other due process rights, such as the right to a timely hearing, are rendered fundamentally hollow. *Nnebe v. Daus*, 931 F.3d 66 (2d Cir. 2019).

5 *City of West Covina v. Perkins*, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

6 *Qadan v. Florida Property Group Associates, Inc.*, 591 B.R. 796 (M.D. Fla. 2018).

7 *Farina v. Metropolitan Transportation Authority*, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).

Form and contents of notice, see §§ 977 to 980.

8 *Watkins v. Greene Metropolitan Housing Authority*, 397 F. Supp. 3d 1103 (S.D. Ohio 2019).

Notice, as required by due process clause, ensures that each party is provided adequate opportunity to prepare and thereafter advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment. *S.T. v. R.W.*, 2018 PA Super 192, 192 A.3d 1155 (2018).

Part of the function of notice, as required by due process, is to give the charged party a chance to marshal the facts in his defense. *Nnebe v. Daus*, 931 F.3d 66 (2d Cir. 2019).

9 *Waveland Drilling Partners III-B, LP v. New Dominion, LLC*, 2019 OK CIV APP 8, 435 P.3d 114 (Div. 3 2018).

Time of notice, see §§ 981, 982.

10 *Farina v. Metropolitan Transportation Authority*, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).

11 *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); *Gissendaner v. Commissioner, Georgia Dept. of Corrections*, 794 F.3d 1327 (11th Cir. 2015); *West v. Kentucky Horse Racing Commission*, 2019 WL 6053014 (E.D. Ky. 2019); *DeNardo v. Maassen*, 200 P.3d 305 (Alaska 2009); *Adair Asset Management, LLC/US Bank v. Honey Bear Lodge, Inc.*, 138 So. 3d 6 (La. Ct. App. 1st Cir. 2014).

12 *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

13 *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

14 *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (adoption proceedings).

- 15 E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594 (1st Cir. 1995).
- 16 Dusenbery v. U.S., 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002); People v. Hernandez, 172 Cal. App. 4th 715, 91 Cal. Rptr. 3d 604 (4th Dist. 2009).
Before forcing a citizen to satisfy debt by forfeiting his or her property, due process requires the government to provide adequate notice of the impending taking. Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).
- 17 In re Energy Future Holdings Corp., 949 F.3d 806 (3d Cir. 2020); Vaquero Energy, Inc. v. County of Kern, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (5th Dist. 2019), review filed, (Dec. 30, 2019) and review denied, (Feb. 26, 2020).
- 18 Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); Kiser v. Lowe, 236 F. Supp. 2d 872 (S.D. Ohio 2002); University of Texas Medical School at Houston v. Than, 901 S.W.2d 926, 101 Ed. Law Rep. 1251 (Tex. 1995).
Disbarment is a penalty imposed upon a lawyer, and he or she is accordingly entitled to procedural due process, which includes a fair notice of the charge. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).
- 19 Kelly v. Borough of Sayreville, N.J., 107 F.3d 1073 (3d Cir. 1997) (holding that a plaintiff complaining that his or her liberty interest in his or her reputation has been injured states an actionable claim under the 14th Amendment only if he or she has suffered an additional deprivation); Olivieri v. Rodriguez, 122 F.3d 406, 38 Fed. R. Serv. 3d 744 (7th Cir. 1997).
Neither harm to one's reputation nor the consequent impairment of future employment opportunities is constitutionally cognizable injuries. Vander Zee v. Reno, 73 F.3d 1365 (5th Cir. 1996).
- 20 Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).
When the police seize property for a criminal investigation, due process does not require them to provide the owner with notice of state law remedies which are established by published, generally available state statutes and case law. City of West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).
- 21 Carson-Grayson v. Grayson, 247 So. 3d 675 (Fla. 5th DCA 2018).
- 22 Seleme v. JP Morgan Chase Bank, 982 N.E.2d 299 (Ind. Ct. App. 2012).

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16B Am. Jur. 2d Constitutional Law § 974

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XIV. Due Process of Law

C. Notice

1. In General

§ 974. Character or type of notice required to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3953

Notice by mail or other means that is certain to ensure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect a liberty or property interest of any party.¹ Certified mail service of process sent to a business address comports with due process provided circumstances are such that successful notification could be reasonably anticipated.² However, under most circumstances, notice sent by ordinary mail is sufficient to discharge the government's due process obligations.³

Service by e-mail alone comports with due process where a plaintiff can demonstrate that the e-mail is likely to reach the defendant.⁴ Service by email on foreign defendants is also a permissible means of service, consistent with due process.⁵ However, an employer's e-mail to an employee stating that the employer intended to file a lawsuit later that day, and attaching the pleadings which the employer intended to file, did not constitute sufficient notice of the commencement of an action and thus would violate due process in the absence of an applicable exception to the notice requirement.⁶

Observation:

Improvements in the reliability of new notice procedures adopted by the government does not necessarily demonstrate the infirmity for purposes of the Due Process Clauses of those that have been replaced.⁷

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Footnotes

- 1 [Lankford v. Idaho](#), 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991); [Matter of 1977 Mercury Coupe](#), I.D. No. 7A93S623012, License No. 300TMI (CA), 129 Ariz. 378, 631 P.2d 533 (1981); [Silverstein v. Minkin](#), 49 N.Y.2d 260, 425 N.Y.S.2d 88, 401 N.E.2d 210 (1980).
- 2 [Wright v. Mirza](#), 2017-Ohio-7183, 95 N.E.3d 1108 (Ohio Ct. App. 1st Dist. Hamilton County 2017), appeal not allowed, 152 Ohio St. 3d 1410, 2018-Ohio-723, 92 N.E.3d 880 (2018).
When unclaimed certified mail represents the government's first attempt at notice, it must take additional reasonable steps to notify the interested party. [Ming Kuo Yang v. City of Wyoming, Michigan](#), 793 F.3d 599 (6th Cir. 2015).
- 3 [Nelson v. City of New York](#), 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956) (finding that notice by mail will be a reasonable form of substituted notice in many instances); [Armendariz-Mata v. U.S. Dept. of Justice, Drug Enforcement Admin.](#), 82 F.3d 679 (5th Cir. 1996).
- 4 [Ferrarese v. Shaw](#), 164 F. Supp. 3d 361 (E.D. N.Y. 2016).
- 5 [Korea Deposit Insurance Corporation v. Jung](#), 59 Misc. 3d 442, 68 N.Y.S.3d 625 (Sup 2017) (under New York law and where the methods prescribed by or compatible with the law of defendants' country have proved ineffective).
Substituted service on a defendant in a defamation case by email would comport with due process where the defendant's on-line activities were the factual heart of the lawsuit, the plaintiff had been unable to locate the defendant, the defendant represented that he was permanently domiciled in an unspecified country outside the United States, and the defendant had acknowledged the receipt of the filings in the suit at his email address. [Neumont University, LLC v. Nickles](#), 304 F.R.D. 594 (D. Nev. 2015).
- 6 [Vickery v. Ardagh Glass Inc.](#), 85 N.E.3d 852 (Ind. Ct. App. 2017), transfer denied, 98 N.E.3d 71 (Ind. 2018).
- 7 [Dusenbery v. U.S.](#), 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

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16B Am. Jur. 2d Constitutional Law § 975

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XIV. Due Process of Law

C. Notice

1. In General

§ 975. Language required in notice to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Providing a notice written in the English language is normally deemed sufficient.¹ To satisfy the constitutional requirement of due process, the notice afforded should, of course, be such as is likely to be received and plainly understood,² although it need not be in a foreign language.³

Caution:

It has been held that notice, as required to satisfy due process, is ineffective if it is delivered in a language that is incomprehensible to the recipient.⁴

Footnotes

- 1 [Soberal-Perez v. Heckler](#), 717 F.2d 36 (2d Cir. 1983).
A publication in English of actions designed to effect changes in the zoning map created by a Special Manhattan Bridge District in the Chinatown district of Manhattan in obscure city publications did not fail to give notice to the community, which was basically Chinese-speaking, and did not violate due process, since it constituted implementation in accord with the municipal ordinance, and since the notice, published in English in the specified publications in conformity with the guidelines, met the statutory requirement in that English is the national language, and it is appropriate that notices required by law be published in that language. [Lai Chun Chan Jin v. Board of Estimate of City of New York](#), 92 A.D.2d 218, 460 N.Y.S.2d 28 (1st Dep't 1983), order aff'd, 62 N.Y.2d 900, 478 N.Y.S.2d 859, 467 N.E.2d 523 (1984).
- 2 [Griffin v. Cook County](#), 369 Ill. 380, 16 N.E.2d 906, 118 A.L.R. 1157 (1938).
- 3 [Carmona v. Sheffield](#), 475 F.2d 738 (9th Cir. 1973) (finding that the fact that all notices of rights under California unemployment laws are in English, with no provision for notices in Spanish for people who speak, read, and write Spanish only, is not a denial of due process).
- 4 [Ramirez v. Young](#), 906 F.3d 530 (7th Cir. 2018).

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16B Am. Jur. 2d Constitutional Law § 976

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XIV. Due Process of Law

C. Notice

1. In General

§ 976. Sufficiency of notice to meet due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3975

Forms

Forms relating to class action notice, generally, see Am. Jur. Pleading and Practice Forms, Parties [\[Westlaw®\(r\) Search Query\]](#)

To meet the requirements of due process, the notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.¹ A notice that is constitutionally sufficient is such as one desirous of actually informing the interested parties might reasonably adopt to accomplish it.² For due process purposes, the opportunity to guess at the factual and legal bases for government action does not substitute for actual notice of the government's intentions.³ Specifically, whether a particular method of notice is reasonable, for due process purposes, depends on the particular circumstances and in determining whether a particular method of notice is reasonable for due process purposes, a court must balance the interest of the state and the individual interest sought to be protected by the 14th Amendment.⁴

The Due Process Clause does not require that an effort succeed in giving notice of the pendency of an action.⁵ Thus, the failure of notice in a specific case does not establish the inadequacy of the attempted notice for 14th Amendment purposes; instead,

the constitutionality of a particular procedure for notice is assessed *ex ante* rather than *post hoc*.⁶ However, after a manner of service fails, some follow-up measure reasonably calculated to reach the intended recipient suffices as constitutionally sufficient service in compliance with procedural due-process protections.⁷

The notice which is an elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of an action and afford them an opportunity to present their objections⁸ although notice need not be an exhaustive guidebook to preserving one's interest.⁹ In other words, it must give sufficient notice of the pendency of the action or proceeding and a reasonable opportunity to a defendant to appear and assert his or her rights before a tribunal legally constituted to adjudicate such rights.¹⁰ Due process must, at a minimum, alert a reasonable recipient to the fact that further inquiry is necessary.¹¹ The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance;¹² however, if with due regard for the practicalities and peculiarities of a case these conditions are reasonably met, the constitutional requirements are satisfied.¹³

CUMULATIVE SUPPLEMENT

Cases:

For purposes of procedural due process, notice must reasonably convey the required information to the affected party, must afford a reasonable time for that party to respond, and is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met. *U.S. Const. Amend. 14*. *Melton v. Indiana Athletic Trainers Board*, 156 N.E.3d 633 (Ind. Ct. App. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 *Dohany v. Rogers*, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930); *Boone v. Wachovia Bank & Trust Co.*, 163 F.2d 809, 173 A.L.R. 1285 (App. D.C. 1947); *Tennessee Cent. Ry. Co. v. Pharr*, 183 Tenn. 658, 194 S.W.2d 486 (1946); *In re Marriage of McLean*, 132 Wash. 2d 301, 937 P.2d 602 (1997); *In re Bergman's Survivorship*, 60 Wyo. 355, 151 P.2d 360 (1944).
The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked. *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 (1962); *Miller v. City of Sammamish*, 9 Wash. App. 2d 861, 447 P.3d 593 (Div. 1 2019), review denied, 194 Wash. 2d 1024, 456 P.3d 403 (2020).
- 2 *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); *Kornblum v. St. Louis County, Mo.*, 72 F.3d 661 (8th Cir. 1995); *Rasooly v. City of Oakley*, 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018); *Grabowski v. Waters*, 901 N.E.2d 560 (Ind. Ct. App. 2009); *In re Adoption of Zev*, 73 Mass. App. Ct. 905, 899 N.E.2d 111 (2009).
- 3 *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019).
- 4 *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); *Sams v. City of Milwaukee, Wis.*, 117 F.3d 991 (7th Cir. 1997); *Griffin v. Bierman*, 403 Md. 186, 941 A.2d 475 (2008).
- 5 *Ho v. Donovan*, 569 F.3d 677 (7th Cir. 2009).
- 6 *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).
- 7 *Matter of on George*, 825 S.E.2d 19 (N.C. Ct. App. 2019).

- 8 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); Baker v. Latham Sparrowbush Associates, 72 F.3d 246 (2d Cir. 1995); Matter of Jacobs, 44 F.3d 84 (2d Cir. 1994); Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997); Ho v. Donovan, 569 F.3d 677 (7th Cir. 2009); Blik v. Palmer, 102 F.3d 1472 (8th Cir. 1997); Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019); Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009); Kochis v. City of Westland, 409 F. Supp. 3d 598 (E.D. Mich. 2019); U.S. Bank N.A. v. Thunder Properties, Inc., 352 F. Supp. 3d 1042 (D. Nev. 2018); In re Marinari, 596 B.R. 809 (Bankr. E.D. Pa. 2019), order aff'd, 610 B.R. 87 (E.D. Pa. 2019); Corrales v. Bradstreet, 153 Cal. App. 4th 33, 62 Cal. Rptr. 3d 440 (3d Dist. 2007); N.C. v. Anderson, 882 So. 2d 990 (Fla. 2004); Hardy v. Phelps, 165 Idaho 137, 443 P.3d 151 (2019); Grabowski v. Waters, 901 N.E.2d 560 (Ind. Ct. App. 2009); Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc., 41 Kan. App. 2d 914, 206 P.3d 63 (2009); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019); Ithaca Finance, LLC v. Lopez, 95 Mass. App. Ct. 241, 137 N.E.3d 398 (2019); Wilczak v. City of Niagara Falls, 174 A.D.3d 1446, 108 N.Y.S.3d 79 (4th Dep't 2019); Matter of Duvall, 834 S.E.2d 177 (N.C. Ct. App. 2019); Howard v. Ohio State Racing Commission, 2019-Ohio-4013, 2019 WL 4756976 (Ohio Ct. App. 10th Dist. Franklin County 2019); Resendes v. Brown, 966 A.2d 1249 (R.I. 2009). Pursuant to due process, notice to the party must be reasonably calculated to inform the party of the pending action and of the opportunity to object. *Ursich v. Ursich*, 10 Wash. App. 2d 263, 448 P.3d 112 (Div. 1 2019), review denied, 194 Wash. 2d 1022, 455 P.3d 124 (2020). Foreign nationals, with respect to service of process, are assured of either (1) personal service, which typically will require service abroad; or (2) substituted service that provides a notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722, 11 Fed. R. Serv. 3d 417 (1988).
- 9 Bank of New York Mellon v. Log Cabin Manor Homeowners Association, 362 F. Supp. 3d 930 (D. Nev. 2019).
- 10 Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956); Mexia Independent School Dist. v. City of Mexia, 134 Tex. 95, 133 S.W.2d 118, 134 A.L.R. 1277 (1939); In re Bergman's Survivorship, 60 Wyo. 355, 151 P.2d 360 (1944).
- 11 Ramirez v. Young, 906 F.3d 530 (7th Cir. 2018). When in the absence of notice, property owners are likely to lose a property right, the Due Process Clause requires that the state take reasonable steps to provide enough notice for reasonable persons to realize they must investigate possible remedies. *M.A.K. Investment Group, LLC v. City of Glendale*, 897 F.3d 1303 (10th Cir. 2018).
- 12 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); N.C. v. Anderson, 882 So. 2d 990 (Fla. 2004); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019); Jackson v. Commissioner of Human Services, 933 N.W.2d 408 (Minn. 2019); Matter of Commitment of S.L.L., 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140 (2019).
- 13 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); In re Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).

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16B Am. Jur. 2d Constitutional Law § 977

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 977. Form and contents of notice, generally; formality; sufficiency to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3975

Notice must describe the nature of the proceeding which may affect the person notified.¹ Moreover, to be sufficient, the notice should state where and at what time the party is to proceed.²

Despite the foregoing, due process does not guarantee or prescribe any particular form of notice.³ It is impossible to set up a rigid formula as to the kind of notice that must be given under the Due Process Clause to inform parties of proceedings affecting their legally protected interests; instead, the notice required will vary with the circumstances and conditions.⁴ The due process right to fair notice is a general rule of law that demands a substantial element of judgment and that can hardly be implemented mechanically⁵ and the determination of whether a certain form of notice violates due process must be made on a case-by-case basis.⁶ In addition, the content of the notice required by due process depends on the appropriate accommodation of the competing interests involved.⁷ The degree of required specificity for notice to comport with due process increases with the significance of the interests at stake.⁸ Although the relative weight of the liberty or property interest is relevant to the form of notice required by due process, one way or another, some form of notice, whether formal or informal, is required before deprivation of a property interest that cannot be characterized as de minimis.⁹

Notice, to comply with due process requirements, must set forth the alleged misconduct with particularity.¹⁰ Elementary notions of fairness enshrined in constitutional jurisprudence regarding the Due Process Clause also dictate that a person receive fair

notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.¹¹

Observation:

Courts routinely find notice insufficient under the Due Process Clause where such notice simply parrots the broad language of applicable regulations.¹²

A method chosen by the parties to receive notice cannot be deemed to offend due process.¹³

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Footnotes

- 1 [Vincent v. Eastern Shore Markets](#), 970 A.2d 160 (Del. 2009); [Kiamesha Development Corp. v. Guild Properties, Inc.](#), 4 N.Y.2d 378, 175 N.Y.S.2d 63, 151 N.E.2d 214 (1958).
For notice to be effective, as required to comply with due process, it must inform the affected party of what critical issue will be determined at the hearing. [Nnebe v. Daus](#), 931 F.3d 66 (2d Cir. 2019).
To be meaningful, notice, as required under due process clause, requires previous notice relative to the issues of fact and law which will control the result to be reached by an administrative tribunal. [Personal Care Products, Inc. v. Smith](#), 578 S.W.3d 262 (Tex. App. Austin 2019).
- 2 [Vincent v. Eastern Shore Markets](#), 970 A.2d 160 (Del. 2009); [McRae v. Robbins](#), 151 Fla. 109, 9 So. 2d 284 (1942); [Schafran & Finkel v. M. Lowenstein & Sons](#), 280 N.Y. 164, 19 N.E.2d 1005 (1939).
Time, generally, see §§ 981, 982.
- 3 [Drummey v. State Board of Funeral Directors and Embalmers](#), 13 Cal. 2d 75, 87 P.2d 848 (1939); [Fhagen v. Miller](#), 29 N.Y.2d 348, 328 N.Y.S.2d 393, 278 N.E.2d 615 (1972).
Due process requires only that reasonable notice be given. [In Interest of Litdell](#), 232 So. 2d 733 (Miss. 1970); [State ex rel. Sautter v. Grey](#), 117 Ohio St. 3d 465, 2008-Ohio-1444, 884 N.E.2d 1062 (2008).
- 4 [Walker v. City of Hutchinson, Kan.](#), 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956); [Baker v. Latham Sparrowbush Associates](#), 72 F.3d 246 (2d Cir. 1995); [School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.](#), 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009).
Before the state may take property and sell it for unpaid taxes, the Due Process Clause of the 14th Amendment requires the government to provide the property owner with notice and an opportunity for a hearing appropriate to nature of case. [Jones v. Flowers](#), 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).
- 5 [Farina v. Metropolitan Transportation Authority](#), 409 F. Supp. 3d 173 (S.D. N.Y. 2019).
- 6 [Puruczky v. Corsi](#), 2018-Ohio-1335, 110 N.E.3d 73 (Ohio Ct. App. 11th Dist. Geauga County 2018).
- 7 [Goss v. Lopez](#), 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); [Purisch v. Tennessee Technological University](#), 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).
- 8 [Nicholas v. Bratton](#), 376 F. Supp. 3d 232 (S.D. N.Y. 2019).
- 9 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
For procedural due process, a party need only be accorded oral or written notice of the charges against him. [Diamond S.J. Enterprise, Inc. v. City of San Jose](#), 395 F. Supp. 3d 1202 (N.D. Cal. 2019).
- 10 [Nicholas v. Bratton](#), 376 F. Supp. 3d 232 (S.D. N.Y. 2019).

- 11 [Aleo v. SLB Toys USA, Inc.](#), 466 Mass. 398, 995 N.E.2d 740 (2013).
12 [Watkins v. Greene Metropolitan Housing Authority](#), 397 F. Supp. 3d 1103 (S.D. Ohio 2019).
13 [Ebbe v. Concorde Investment Services, LLC](#), 392 F. Supp. 3d 228 (D. Mass. 2019), [aff'd on other grounds](#),
 2020 WL 1429581 (1st Cir. 2020).

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16B Am. Jur. 2d Constitutional Law § 978

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 978. Voluntary, actual, or extra-official notice where statute does not expressly require notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3975

Under some authority, the requirement of notice as a matter of right in accordance with due process of law is satisfied by a statute which either expressly or by necessary implication confers such right.¹ To be constitutional under other authority, however, the statute itself must specifically require notice since, in the absence of such a requirement, it will be deemed to authorize proceedings without notice.²

Actual knowledge cannot operate as a substitute for the notice that is required by due process of law.³ Hence, extra-official or casual notice is not sufficient.⁴

Due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take the necessary steps to preserve that right.⁵

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Footnotes

- ¹ [Sinqefield v. Valentine](#), 159 Miss. 144, 132 So. 81, 76 A.L.R. 238 (1931); [In re Lutker](#), 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
- ² [School Dist. No. 8 of Sherman County v. State Bd. of Ed.](#), 176 Neb. 722, 127 N.W.2d 458 (1964); [Farnow v. Department 1 of Eighth Judicial Dist. Court in and for Clark County](#), 64 Nev. 109, 178 P.2d 371 (1947).

- 3 [Watkins v. Dodson](#), 159 Neb. 745, 68 N.W.2d 508 (1955).
- 4 [Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County](#), 274 Cal. App. 2d 154, 79 Cal. Rptr. 23 (2d Dist. 1969).
- 5 [In re Medaglia](#), 52 F.3d 451 (2d Cir. 1995).

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16B Am. Jur. 2d Constitutional Law § 979

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 979. Necessity of actual or actual personal notice to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3975

Personal service of written notice within the jurisdiction is the classic form of notice, always adequate in any type of proceeding to satisfy the requirements of due process.¹ If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, procedural due process is not offended.² Although due process does not require actual notice,³ due process may be offended by the failure to give actual personal notice under the circumstances of a particular case.⁴ Due process requires that a chosen method of service be reasonably certain to give actual notice of the pendency of a proceeding to those parties whose liberty or property interests may be adversely affected by the proceeding.⁵ If a party employs a procedure reasonably calculated to achieve notice, a successful achievement is not necessary to satisfy due process requirements.⁶

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Footnotes

- 1 [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).
Service of process as required by due process, generally, see [Am. Jur. 2d, Process](#) § 92.
- 2 [Morton v. County of Erie](#), 335 F. Supp. 3d 449 (W.D. N.Y. 2018), *aff'd*, 796 Fed. Appx. 40 (2d Cir. 2019).
- 3 [Bank of New York Mellon v. Log Cabin Manor Homeowners Association](#), 362 F. Supp. 3d 930 (D. Nev. 2019); [Rasooly v. City of Oakley](#), 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018).
- 4 [Tulsa Professional Collection Services, Inc. v. Pope](#), 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

5 [Dukes v. Munoz, 346 Ga. App. 319, 816 S.E.2d 164 \(2018\).](#)

6 [Baker v. Latham Sparrowbush Associates, 72 F.3d 246 \(2d Cir. 1995\).](#)

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 980. Substituted or constructive service of notice to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Constitutional Law](#)  3881, 3975

For due process purposes, there must be some form of constructive or substituted service,¹ especially when actual service is impracticable,² as where people are missing or unknown.³

Where personal service of notice of court proceedings is not feasible constructive notice may satisfy due process.⁴ Due Process Clause requires that, for constructive notice of a lawsuit to be sufficient, a party must exercise due diligence in attempting to locate a litigant's whereabouts.⁵ The requirement that unknown parties have at least constructive notice is no dispensable formality; rather, it is an essential element of due process without which a court has no jurisdiction to bind the absent parties.⁶

In considering whether substitute service is adequate, courts are cognizant that due process, reduced to its most elemental component, requires notice.⁷ The adequacy of substituted service of process, so far as due process is concerned, is dependent on whether or not the form of service provided for and employed is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard; if it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied.⁸

Practice Tip:

Because substituted service of process statutes provide an exception to the general rule that a defendant must be personally served, they must be strictly construed to protect due process guarantees.⁹

Due process imposes a requirement that service by publication be the best means practicable to provide notice to the interested party.¹⁰ Constructive service of process by publication satisfies due process if and only if the names and addresses of the defendants to be served are not reasonably ascertainable.¹¹ Notice by publication is not sufficient, under due process requirements, with respect to an individual whose name and address are known or easily ascertainable.¹² Because notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits, the constitutional prerequisite, under the due process clause, for allowing such service when the addresses of those parties are unknown is a showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts.¹³ Due diligence in attempting to locate an adverse party before resorting to service by publication, as required by due process, requires that a plaintiff follow up on possessed or reasonably available information or resources.¹⁴

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Footnotes

- 1 [International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement](#), 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).
As to substituted and constructive service, generally, see [Am. Jur. 2d, Process](#) §§ 136 to 144.
Personal service of process on property owners to give notice of a foreclosure action is not required to satisfy due process. [Griffin v. Bierman](#), 403 Md. 186, 941 A.2d 475 (2008).
- 2 [Bekins v. Huish](#), 1 Ariz. App. 258, 401 P.2d 743 (1965).
- 3 [Walker v. City of Hutchinson, Kan.](#), 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).
- 4 [T.H. McElvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc.](#), 2017-NMSC-004, 388 P.3d 240 (N.M. 2016).
- 5 [Jordache White and American Transport, LLC v. Reimer](#), 61 N.E.3d 301 (Ind. Ct. App. 2016).
- 6 [Araca Merchandise L.P. v. Does](#), 182 F. Supp. 3d 1290 (S.D. Fla. 2016).
- 7 [Century Sur. Co. v. Essington Auto Center, LLC](#), 2016 PA Super 101, 140 A.3d 46 (2016).
- 8 [Milliken v. Meyer](#), 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357 (1940); [Rasooly v. City of Oakley](#), 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018); [Shoei Kako Co. v. Superior Court](#), 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1st Dist. 1973).
The adequacy of this notice, as applied to substituted service, depends upon whether it is reasonably calculated to give the party actual notice of the pending litigation and an opportunity to be heard. [Century Sur. Co. v. Essington Auto Center, LLC](#), 2016 PA Super 101, 140 A.3d 46 (2016).
To comply with due process, when some evidence indicates whereabouts of absent party, any form of substituted service authorized by trial court must have reasonable chance of giving that party actual notice of proceeding. [People In Interest of A.B.-A.](#), 2019 COA 125, 451 P.3d 1278 (Colo. App. 2019).
- 9 [Moss v. Estate of Hudson by and through Hudson](#), 252 So. 3d 785 (Fla. 5th DCA 2018).
- 10 [Ruffino v. Lokosky](#), 245 Ariz. 165, 425 P.3d 1108 (Ct. App. Div. 1 2018), review denied, (Dec. 13, 2018).
- 11 [T.H. McElvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc.](#), 2017-NMSC-004, 388 P.3d 240 (N.M. 2016).
- 12 [Robinson v. Hanrahan](#), 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972); [Chapin v. Aylward](#), 204 Kan. 448, 464 P.2d 177 (1970); [In re Turkey Creek Conservancy Dist.](#), 2008 OK 8, 177 P.3d 558 (Okla. 2008).

In too many instances, notice by publication is no notice at all. [Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 \(1956\)](#).

As general rule, notice by publication is not enough to comply with due process with respect to person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by proceedings in question. [M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 \(10th Cir. 2018\)](#).

13 [Jorree v. PMB Rentals, LLC, 349 Ga. App. 332, 825 S.E.2d 817 \(2019\)](#).

14 [Owens v. Tergeson, 2015 COA 164, 363 P.3d 826 \(Colo. App. 2015\)](#).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 981. Time of notice for purposes of due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3953

Under the Due Process Clause, a defendant has an inalienable right to know in advance the nature of the cause of action being asserted against him.¹ Accordingly, the due process right to notice must be granted at a meaningful time and in a meaningful manner;² the person to be affected must be fairly and timely apprised of what interests are sought to be reached by the triggered process.³ Ordinarily, the notice must be given a sufficient length of time before the hearing to afford an opportunity to be present.⁴ Due process requires notice to be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights.⁵ Specifically, to comply with due process requirements, notice must be given sufficiently in advance of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded.⁶

A notice which fails to give an adequate length of time is invalid, notwithstanding, by the local practice, that there will be several days' additional time before the case can be called for trial or default taken or that the court in its discretion will probably set aside a default judgment and permit a defense.⁷ The procedural due process right to notice before deprivation of property must be granted at a time when the deprivation can still be prevented; no damage award for wrongful deprivation can undo the fact that the arbitrary taking that is subject to the right of procedural due process has already occurred.⁸ Notice before the government takes property is constitutionally adequate under the due process clause when the practicalities and peculiarities of the case are reasonably met.⁹

The very nature of the principle that notice must be given sufficiently in advance of the hearing to afford an opportunity to be present makes it clear that the question whether, from the viewpoint of time, there has been a sufficient compliance with the notice requirement which the due process guarantee imposes is determinable according to the facts and circumstances of particular cases.¹⁰ The timing of the notice required by due process depends on appropriate accommodation of the competing interests involved.¹¹

Other than satisfying a reasonableness standard, no precise rule has been or could be developed specifying precisely how much time is required for a proper notice to satisfy the Due Process Clause; however, a 2-hour notice to a landlord involved in a bankruptcy hearing is clearly inadequate.¹² On the other hand, a police officer's due process rights were not violated where the officer has been informed of a suspension and hearing date six days before the hearing where the officer's union has received copies of the notice and where the second notice establishes the date, nature, and location of the hearing and specified charges.¹³

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Footnotes

- 1 [Perez v. Lorraine Enterprises, Inc.](#), 769 F.3d 23 (1st Cir. 2014).
- 2 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); [In re DeLeon J.](#), 290 Conn. 371, 963 A.2d 53 (2009); [Department of Highway Safety and Motor Vehicles v. Hofer](#), 5 So. 3d 766 (Fla. 2d DCA 2009); [In re Adoption of B.J.M.](#), 42 Kan. App. 2d 77, 209 P.3d 200 (2009); [Matter of L.C.P.](#), 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019); [Gul v. Center for Family Medicine](#), 2009 SD 12, 762 N.W.2d 629, 242 Ed. Law Rep. 374 (S.D. 2009).
- 3 [Matter of L.C.P.](#), 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019).
- 4 [Fitzgerald v. Cleland](#), 650 F.2d 360 (1st Cir. 1981); [Jacobson-Lyons Stone Co. v. Silverdale Cut Stone Co.](#), 189 Kan. 511, 370 P.2d 68 (1962); [Smith v. Smith](#), 2 N.Y.2d 120, 157 N.Y.S.2d 546, 138 N.E.2d 790 (1956).
Hearing, generally, see §§ 987 to 1017.
The notice must afford a reasonable time for those interested to make their appearances. [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); [Jones v. Bailey](#), 576 S.W.3d 128 (Ky. 2019).
- 5 [Eureka County v. Seventh Judicial District Court in and for County of Eureka](#), 134 Nev. 275, 417 P.3d 1121, 134 Nev. Adv. Op. No. 37 (2018).
- 6 [Application of Gault](#), 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); [Geldermann v. Geldermann](#), 428 P.3d 477 (Alaska 2018); [Town of New Hartford v. Connecticut Resources Recovery Authority](#), 291 Conn. 489, 970 A.2d 570 (2009).
A failure to timely notify a party in an antidumping proceeding of ex parte meetings deprives the party a full opportunity to respond, thus violating procedural due process. [Hyundai Electronics Industries Co., Ltd. v. U.S.](#), 28 Ct. Int'l Trade 517, 342 F. Supp. 2d 1141 (2004).
- 7 [Roller v. Holly](#), 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900).
- 8 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
Due process does not impose a rigid requirement as to the precise timing with which notice must be given, rather, constitutionally adequate notice should apprise a plaintiff of its right of redemption and to enable it to take appropriate steps to protect its property interests prior to deprivation. [Farina v. Metropolitan Transportation Authority](#), 409 F. Supp. 3d 173 (S.D. N.Y. 2019).
- 9 [Cordell v. Klingsheim](#), 2018 COA 80, 434 P.3d 741 (Colo. App. 2018), cert. denied, 2019 WL 423143 (Colo. 2019).
- 10 [Wick v. Chelan Electric Co.](#), 280 U.S. 108, 50 S. Ct. 41, 74 L. Ed. 212 (1929).
- 11 [Goss v. Lopez](#), 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).
- 12 [Matter of Timely Secretarial Service, Inc.](#), 987 F.2d 1167, 25 Fed. R. Serv. 3d 903 (5th Cir. 1993).
It was a denial of due process where the trial judge advanced the date of the hearing on the defendant's motion to set aside the verdict or to grant a new trial and gave notice to the defendants only three hours and 10 minutes before the hearing was to be held. [Cremeans v. Goad](#), 158 W. Va. 192, 210 S.E.2d 169 (1974).

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[Wallace v. Tilley, 41 F.3d 296, 30 Fed. R. Serv. 3d 1317 \(7th Cir. 1994\).](#)

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16B Am. Jur. 2d Constitutional Law § 982

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 982. Time of notice for purposes of due process requirements—Delay or postponement of notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Generally, notice after the fact does not satisfy due process.¹ Exceptions to the general rule, holding that due process requires notice and a hearing prior to a government action involving the deprivation of property rights, occur only in extraordinary situations when some valid governmental interest is at stake, justifying postponing the hearing until after the event.² For instance, due process is not denied where the postponement of notice and hearing is necessary to protect the public from contaminated food, from bank failure, from misbranded drugs, to aid collection of taxes, or to aid a war effort.³ Nevertheless, "extraordinary situations" which will justify postponing due process notice and opportunity for a hearing until after the deprivation of property must be truly unusual.⁴

Observation:

Although an important governmental interest may justify postponement of the notice and hearing until after the initial taking of a protected property interest has occurred, due process is not satisfied by the availability of a collateral judicial remedy separate from the seizure procedure itself.⁵

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Footnotes

- 1 [Richard v. Bank of America, N.A.](#), 258 So. 3d 485 (Fla. 4th DCA 2018).
- 2 [U.S. v. James Daniel Good Real Property](#), 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).
For purposes of due process, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest. [James Madison Ltd. by Hecht v. Ludwig](#), 82 F.3d 1085 (D.C. Cir. 1996).
- 3 [Calero-Toledo v. Pearson Yacht Leasing Co.](#), 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974) (holding that the Due Process Clause of the 14th Amendment is not violated by the seizure, under Puerto Rican statutes, of a yacht without prior notice to or hearing of the lessor-owner and of the lessees after the vessel was being used by one of the lessees for the unlawful purpose of transporting or facilitating the transportation of, controlled substances, including marijuana).
- 4 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 5 [Kash Enterprises, Inc. v. City of Los Angeles](#), 19 Cal. 3d 294, 138 Cal. Rptr. 53, 562 P.2d 1302 (1977).

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16B Am. Jur. 2d Constitutional Law § 983

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 983. Persons entitled to notice under due process requirements

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3953, 3974

Forms

Forms relating to class action notice, generally, see Am. Jur. Pleading and Practice Forms, Parties [\[Westlaw®\(r\) Search Query\]](#)

Parties whose rights are to be affected are entitled under the due process clause to be heard; in order to enjoy that right, they must first be notified.¹ In other words, persons entitled to notice of a proceeding are, generally, those who are to be affected by a judgment or order therein.² Judicial action enforcing a judgment against the person or property of one who has not been a party to the proceeding in which the judgment has been rendered and has not been made a party by service of process is not that due process which the Fifth and 14th Amendments require.³

Parties who have properly appeared in action are entitled to notice of any impending motions or hearings under due process of law.⁴ Even a pro se answer in the form of a signed letter that identifies the parties, the case, and the defendant's current address, constitutes a sufficient appearance to require notice to that party of any subsequent proceedings as a matter of due process.⁵

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Footnotes

- 1 [Nnebe v. Daus](#), 931 F.3d 66 (2d Cir. 2019).
As to hearing requirements, generally, see §§ [987](#) to [1017](#).
- 2 [State ex rel. Sweezer v. Green](#), 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, [State ex rel. North v. Kirtley](#), 327 S.W.2d 166 (Mo. 1959)); [People ex rel. Morriale v. Branham](#), 291 N.Y. 312, 52 N.E.2d 881 (1943), opinion adhered to on reargument, 292 N.Y. 127, 54 N.E.2d 331 (1944).
- 3 [Hansberry v. Lee](#), 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).
- 4 [Doe v. Northwestern Memorial Hosp.](#), 2014 IL App (1st) 140212, 385 Ill. Dec. 620, 19 N.E.3d 178 (App. Ct. 1st Dist. 2014).
- 5 [In re R.K.P.](#), 417 S.W.3d 544 (Tex. App. El Paso 2013).

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16B Am. Jur. 2d Constitutional Law § 984

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 984. Persons entitled to notice under due process requirements—Representative actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3881, 3953, 3976

In certain cases, notice to one party may, by reason of representation, be notice to another at least so far as the representative relation is concerned.¹ However, the doctrine of virtual representation must be applied cautiously in order to avoid infringing on the principles of due process because it forces the principles of res judicata on nonparties to a judgment.²

Service of process upon an attorney of record when a cause is pending creates a reasonable presumption that it will reach the client and will satisfy due process requirements.³ However, notice to counsel of record must be effected under circumstances from which it can at least be reasonably presumed that notice resulting from such service will be communicated to the litigant.⁴ To pass Constitutional requirements of due process, domestic service of process on counsel of an international defendant, which may include service via electronic means, must be supported by a showing of adequate communication between the person to be served and counsel.⁵ Similarly, service of process on an agent appointed by statute affords sufficient due process if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice.⁶

A statute which provides that jurisdiction to render judgment against an association which will bind the joint property of the associates may be acquired by service on one or more of its members is consistent with due process; in addition, so far as constitutionality is concerned, there is no distinction between such a statute applied to partnerships and one applied to other unincorporated associations.⁷ However, when it comes to actually reaching the individual property of a person, such as a stockholder in a corporation or a person in an association, notice is required.⁸ Notice to a corporation of demands by dissenting

stockholders in connection with a vote to sell corporate assets complies with the constitutional requirement of due process of law, even though the effect of such a notice also is to bind the majority stockholders.⁹

Due process is not satisfied by notice to a person known to be an incompetent who is without the protection of a guardian.¹⁰

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Footnotes

- 1 [Hansberry v. Lee](#), 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).
- 2 [Klugh v. U.S.](#), 818 F.2d 294 (4th Cir. 1987) (holding that heirs not in being or unknown and not represented by guardians ad litem at the time of a condemnation proceeding cannot be bound by condemnation judgments under the doctrine of virtual representation where the adult heirs have not received approval of the condemnation court to represent their interests).
Mandatory class actions aggregating damage claims implicate the due process principle of general application that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [Ortiz v. Fibreboard Corp.](#), 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999).
- 3 [Agrawal v. Oklahoma Dept. of Labor](#), 2015 OK 67, 364 P.3d 618 (Okla. 2015).
- 4 [Adair Asset Management, LLC/US Bank v. Honey Bear Lodge, Inc.](#), 138 So. 3d 6 (La. Ct. App. 1st Cir. 2014).
- 5 [Halvorssen v. Simpson](#), 328 F.R.D. 30, 102 Fed. R. Serv. 3d 106 (E.D. N.Y. 2018).
- 6 [Malnar v. Joice](#), 236 Ariz. 170, 337 P.3d 43, 310 Ed. Law Rep. 1135 (2014).
Plaintiff's service of process on a chief operating officer using the court's e-filing system was reasonably calculated to apprise the officer of the pendency of the securities fraud action, and therefore comported with due process requirements, where the statutory methods of service were impracticable, and the officer's counsel received notices of filings through the system. [Wimbledon Financing Master Fund, Ltd. v. Laslop](#), 169 A.D.3d 550, 95 N.Y.S.3d 152 (1st Dep't 2019).
- 7 [Jardine v. Superior Court in and for Los Angeles County](#), 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291 (1931).
- 8 [Coe v. Armour Fertilizer Works](#), 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 (1915); [Detroit Trust Co. v. Stormfeltz-Loveley Co.](#), 257 Mich. 655, 242 N.W. 227, 88 A.L.R. 1263 (1932).
- 9 [Voeller v. Neilston Warehouse Co.](#), 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941).
- 10 [Blackhawk Townhouses Owners Association Inc. v. J.S.](#), 2018 UT App 56, 420 P.3d 128 (Utah Ct. App. 2018).

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16B Am. Jur. 2d Constitutional Law § 985

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 985. When notice is not required under due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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The government interest in not providing notice is rarely significant, for the purposes of due process analysis, because notice requirements impose little fiscal or administrative burden upon government agencies.¹ Accordingly, the cases in which notice may be dispensed with are few; as a general rule, proceedings not founded on notice to the person affected are void.² In certain cases, however, notice is not necessary.³ In fact, the very nature of particular proceedings may be such as to charge persons to be affected thereby with notice.⁴ For instance, the Due Process Clause does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations contained in a state's self-executing statute of limitations.⁵ There may also be cases where persons to be affected by proceedings will not be entitled to notice and a hearing under the Due Process Clause because of a waiver thereof, whether by appearance in the proceedings or otherwise.⁶

When necessary to ensure the public safety, the legislature may under its police power authorize municipal authorities summarily to destroy property without legal process or previous notice to the owner, and without recourse against such authorities for the injuries so occasioned; so far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction.⁷

A party's ability to take steps to safeguard its interests does not relieve the state of its obligation under Due Process Clause to provide notice of possible adverse action against the party's protected rights.⁸ However, due process does not require notice

to persons who arrange their affairs to conceal their interests and does not require notice to beneficial, as opposed to legal, owners of real property.⁹

Due process does not require notice of a law.¹⁰ No notice need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge.¹¹ Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.¹² When a published law provides a certain amount of time for a person to take action in order to protect his or her property rights, the government generally does not have to notify that person about a deadline, but when it is only after government actions take place that a time period begins to run, due process requires that the government provide notice.¹³

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Footnotes

- 1 [Paula E. v. State, Department of Health & Social Services, Office of Children's Services, 276 P.3d 422 \(Alaska 2012\).](#)
- 2 [Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc., 41 Kan. App. 2d 914, 206 P.3d 63 \(2009\).](#)
- 3 [Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 \(1962\)](#) (finding that not every order entered without notice offends due process).
A statute which permits the seller of goods under an installment contract for the sale of household goods to obtain a writ of sequestration to recover the possession of the goods without prior notice to the buyer or opportunity for a hearing does not violate due process. [Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 \(1974\).](#)
- 4 [Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S. Ct. 94, 74 L. Ed. 378 \(1930\).](#)
In certain cases of attachment of property in which a redelivery bond is given, the statutes provide for judgment against the principal and sureties on the bond in the event judgment goes in favor of the plaintiff; such a proceeding without notice to the surety has been sustained. [Shaumyan v. O'Neill, 987 F.2d 122 \(2d Cir. 1993\).](#)
- 5 [Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 \(1988\).](#)
- 6 § 986.
- 7 [McCormick v. Stalder, 105 F.3d 1059 \(5th Cir. 1997\)](#) (holding that procedural due process protections are defined in accordance with the magnitude of the public interest at stake; if the public safety is at issue, liberty or property interests can be deprived even without a prior hearing).
- 8 [M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 \(10th Cir. 2018\).](#)
- 9 [McKenzie v. City of Chicago, 118 F.3d 552 \(7th Cir. 1997\).](#)
- 10 [Edmondson v. Fremgen, 17 F. Supp. 3d 833 \(E.D. Wis. 2014\), aff'd, 590 Fed. Appx. 613 \(7th Cir. 2014\).](#)
- 11 [37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 1997 FED App. 0158P \(6th Cir. 1997\).](#)
Under the Due Process Clause, governing bodies may enact generally applicable laws, that is, they may legislate, without affording an affected party so much as a notice. [Hoeck v. City of Portland, 57 F.3d 781 \(9th Cir. 1995\), as amended, \(July 10, 1995\).](#)
- 12 [Othi v. Holder, 734 F.3d 259 \(4th Cir. 2013\); Edmondson v. Fremgen, 17 F. Supp. 3d 833 \(E.D. Wis. 2014\), aff'd, 590 Fed. Appx. 613 \(7th Cir. 2014\).](#)
- 13 [M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 \(10th Cir. 2018\).](#)

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16B Am. Jur. 2d Constitutional Law § 986

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 986. When notice is not required under due process requirements—Waiver by appearance or other act

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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The due process right to notice prior to a civil judgment is subject to waiver.¹ Such waiver may arise by reason of a person's voluntary appearance in the proceedings,² whether general³ or special.⁴ Thus, if a person actually appears in the proceeding, the notice becomes unimportant.⁵

Consent by contract is an example of a valid written waiver of notice, and a person may agree by contract to be bound by extraterritorial service of process, even in a personal action.⁶ In addition, the Supreme Court has found that a cognovit clause in a note is not per se violative of 14th Amendment, and that a valid cognovit clause is an effective waiver of the due process rights to notice and hearing; however, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue and in any event, due process rights to prejudgment notice must be voluntarily, intelligently, and knowingly waived, with awareness of the legal consequences.⁷

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Footnotes

- ¹ [D. H. Overmyer Co. Inc., of Ohio v. Frick Co.](#), 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).
- ² [Louisville & N.R. Co. v. Schmidt](#), 177 U.S. 230, 20 S. Ct. 620, 44 L. Ed. 747 (1900).
- ³ [State ex rel. Berland Shoe Stores v. Haney](#), 208 Minn. 105, 292 N.W. 748 (1940).

- 4 [Western Life Indemnity Co. of Illinois v. Rupp](#), 235 U.S. 261, 35 S. Ct. 37, 59 LED 220 (1914); [Schranner v. Schraner \(Emerson\)](#), 110 So. 2d 33 (Fla. 1st DCA 1959).
- 5 As to general or special appearance, generally, see [Am. Jur. 2d, Appearance §§ 2, 3](#).
- 6 [Doty v. Love](#), 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935) (opening of closed bank).
- 7 [Frey & Horgan Corp. v. Superior Court in and for City and County of San Francisco](#), 5 Cal. 2d 401, 55 P.2d 203 (1936).
- [D. H. Overmyer Co. Inc., of Ohio v. Frick Co.](#), 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972) (finding further that the inability of a debtor who had executed a note containing a cognovit clause authorizing the creditor, upon the debtor's default, to designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record, to predict with accuracy how or when the creditor would proceed under the confession clause upon the debtor's default does not in itself militate against an effective waiver of the debtor's due process rights to notice and hearing prior to entry of a judgment against him).
- A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary upon application by the plaintiff who, although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed, and whereby the defendant, to obtain relief by striking or opening the judgment, must assert prima facie grounds for relief and must persuade the court to open the judgment, are not unconstitutional on their face as violative of due process; under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. [Swarb v. Lennox](#), 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138 (1972).

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16B Am. Jur. 2d Constitutional Law XIV D Refs.

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Constitutional Law

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16B Am. Jur. 2d Constitutional Law § 987

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Constitutional Law

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XIV. Due Process of Law

D. Hearing

1. In General

§ 987. Necessity of hearing under due process requirements, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879, 3881, 4061

The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.¹ An opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of due process.² The opportunity to be heard has been referred to as a fundamental requirement,³ or an issue of fundamental fairness,⁴ or a fundamental premise,⁵ or a fundamental requisite,⁶ or a fundamental pillar of due process.⁷ The constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard.⁸ Due process requires that a person have a fair chance to respond to allegations made against him, and that opportunity must be provided in a reliable and orderly fashion.⁹ However, the hearing required by the Due Process Clause is only one appropriate to the nature of the case.¹⁰

Just as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in proceedings without a hearing or opportunity to be heard, so it cannot, without disregarding the requirement of due process, give conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.¹¹ It is a violation of due process for a judgment to be made binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard.¹²

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Footnotes

- 1 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); Rogal v. American Broadcasting Companies, Inc., 74 F.3d 40, 34 Fed. R. Serv. 3d 388 (3d Cir. 1996); Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).
Although the concept is flexible, the right to procedural due process encompasses the opportunity to be heard when the state seeks to infringe a protected liberty or property right. Hise v. Laiviera, 2018-Ohio-5399, 127 N.E.3d 460 (Ohio Ct. App. 7th Dist. Monroe County 2018).
Due process requires that a party be given a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. VMD Financial Services, Inc. v. CB Loan Purchase Associates, LLC, 68 So. 3d 997 (Fla. 4th DCA 2011).
The crux of due process is an opportunity to be heard and the right to adequately represent one's interests. Markham v. Kodiak Island Borough Board of Equalization, 441 P.3d 943 (Alaska 2019).
A "request for a hearing" is a request for an opportunity to be heard, which necessarily implicates due process. Muma v. Pennsylvania Department of Health, Division of Nursing Care Facilities, 223 A.3d 742 (Pa. Commw. Ct. 2019).
- 2 U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); Anthony v. Interform Corp., 96 F.3d 692 (3d Cir. 1996); Mallette v. Arlington County Employees' Supplemental Retirement System II, 91 F.3d 630 (4th Cir. 1996).
In all cases of a due process claim, the inquiry is whether, under the particular circumstances presented, the hearing was fair and accorded the individual the essential elements of due process. Patrick v. Success Academy Charter Schools, Inc., 354 F. Supp. 3d 185, 362 Ed. Law Rep. 928 (E.D. N.Y. 2018).
- 3 Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996); Elrod v. Bauman, 136 N.E.3d 232 (Ind. Ct. App. 2019).
Due process requires a meaningful opportunity to be heard, to testify, and to present evidence; otherwise, it is fundamental error. Serna v. State, 264 So. 3d 999 (Fla. 4th DCA 2019).
- 4 Campbell v. Barr, 387 F. Supp. 3d 286 (W.D. N.Y. 2019).
- 5 Morera v. Thurber, 187 Conn. App. 795, 204 A.3d 1 (2019).
- 6 Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).
- 7 Doe v. Department of Health and Human Services, 2018 ME 164, 198 A.3d 782 (Me. 2018).
- 8 Aden v. Nielsen, 409 F. Supp. 3d 998 (W.D. Wash. 2019); L.M.F. v. C.D.F., 2019 WL 3243989 (Ala. Civ. App. 2019); Department of Revenue ex rel. Poynter v. Bunnell, 51 So. 3d 543 (Fla. 1st DCA 2010).
When a protected interest is implicated, the Fourteenth Amendment Due Process Clause grants an aggrieved party the opportunity to present his case and have its merits fairly judged. Doe I v. Evanchick, 355 F. Supp. 3d 197 (E.D. Pa. 2019).
- 9 Life Technologies Corporation v. Govindaraj, 931 F.3d 259 (4th Cir. 2019), as amended, (Aug. 7, 2019).
- 10 Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
- 11 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
- 12 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552, 26 Fed. R. Serv. 2d 669 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971).

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16B Am. Jur. 2d Constitutional Law § 988

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XIV. Due Process of Law


D. Hearing

1. In General

§ 988. Purpose of hearing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879

The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his or her possessions; the purpose of such a requirement is not only to ensure abstract fair play to the individual, but also more particularly to protect his or her use and possession of property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of property.¹ Since the essential reason for the due process requirement of a hearing prior to deprivation of property is to prevent unfair and mistaken deprivations of property, such a hearing must provide a real due process test.²

The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.³

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Footnotes

- ¹ [Washington v. Glucksberg](#), 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); [Shavers v. Kelley](#), 402 Mich. 554, 267 N.W.2d 72 (1978).
- ² [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); [Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461](#), 924 N.W.2d 594 (Minn. 2019).

3 [Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 \(1974\).](#)

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XIV. Due Process of Law

D. Hearing

1. In General

§ 989. Minimum due process requirements regarding hearing, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879 to 3881, 3893

An opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement.¹ The requirements of procedural due process are not satisfied simply because a hearing took place, and the court looks to the substance, not to bare form, to determine whether constitutional minimums have been honored.²

The right to a hearing does not depend upon the nature of the right violated, that is, whether the right is a fundamental right or is state-created.³

Observation:

The right to a hearing under the Due Process Clause does not depend on a demonstration of certain success.⁴ Litigation is rarely pristine and is filled with risk, as evidence gets lost, witnesses lie, judges err, and the Due Process Clause does not protect against these missteps as such; rather, its interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result.⁵

The constitutionally protected rights afforded by due process include the right to be heard which, in certain circumstances, includes the right to assistance from an interpreter during the proceedings itself.⁶

The Fifth Amendment entitles aliens to due process of law in deportation proceedings, and detention during such proceedings is constitutionally valid aspect of deportation process.⁷

Due process is not denied when a party fails to avail himself of the opportunity to be heard after it is offered to him.⁸

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Footnotes

- 1 [Saavedra v. City of Albuquerque](#), 73 F.3d 1525 (10th Cir. 1996); [Hargis v. Hargis](#), 2019 Ark. 321, 587 S.W.3d 208 (2019); [Williams v. Board of Supervisors, Louisiana Community & Technical College Systems](#), 272 So. 3d 84, 367 Ed. Law Rep. 656 (La. Ct. App. 3d Cir. 2019).
Character and sufficiency of hearing, generally, see §§ 997 to 1001.
- 2 [Johnson v. Morales](#), 946 F.3d 911 (6th Cir. 2020).
- 3 [Howard v. Grinage](#), 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).
- 4 [Cleveland Bd. of Educ. v. Loudermill](#), 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985).
- 5 [Energy West Mining Co v. Oliver](#), 555 F.3d 1211 (10th Cir. 2009).
- 6 [City of Philadelphia v. Shih Tai Pien](#), 224 A.3d 71 (Pa. Commw. Ct. 2019).
- 7 [Demore v. Kim](#), 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).
- 8 [Zale v. Moraine Valley Community College](#), 2019 IL App (1st) 190197, 434 Ill. Dec. 253, 135 N.E.3d 137, 372 Ed. Law Rep. 411 (App. Ct. 1st Dist. 2019), appeal denied, 435 Ill. Dec. 707, 140 N.E.3d 265 (Ill. 2020).

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16B Am. Jur. 2d Constitutional Law § 990

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XIV. Due Process of Law

D. Hearing

1. In General

§ 990. Minimum due process requirements regarding hearing, generally—Requirement of meaningful opportunity to be heard

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879, 3881

A failure to accord an accused a fair hearing violates even minimal standards of due process.¹ The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.² Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.³

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Footnotes

- ¹ [Turner v. State of La.](#), 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).
- ² [Barry v. Barchi](#), 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); [Johnson v. Morales](#), 946 F.3d 911 (6th Cir. 2020); [Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury](#), 559 F.3d 595 (7th Cir. 2009); [Dahl v. Rice County, Minn.](#), 621 F.3d 740 (8th Cir. 2010); [Ford v. Saul](#), 950 F.3d 1141 (9th Cir. 2020); [Gordon v. Arizona Registrar of Contractors](#), 247 Ariz. 146, 447 P.3d 327 (Ct. App. Div. 1 2019); [Hargis v. Hargis](#), 2019 Ark. 321, 587 S.W.3d 208 (2019); [Bailey v. Review Board of Indiana Department of Workforce Development](#), 132 N.E.3d 386 (Ind. Ct. App. 2019); [Matter of Duvall](#), 834 S.E.2d 177 (N.C. Ct. App. 2019); [In re C.L.S.](#), 2020 VT 1, 2020 WL 111665 (Vt. 2020).
- Time of hearing, generally, see § 1001.

Procedural due process safeguards a person's constitutional rights and requires that a person be given a meaningful opportunity to be heard. [Patterson v. Charles](#), 282 So. 3d 1075 (La. Ct. App. 4th Cir. 2019). Within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. [Shah v. Shah](#), 70 Va. App. 588, 829 S.E.2d 586 (2019). The essential principle embodied in the Due Process Clause is this: the government may not deprive a person of a property right or a liberty interest without affording that person the opportunity to be heard in a meaningful way and at a meaningful time to avert a wrongful deprivation of that right or interest. [State v. Gonzalez](#), 457 P.3d 938 (Kan. Ct. App. 2019).

The opportunity for hearing required to satisfy due process must be appropriate to the nature of the case, and must be at a meaningful time and in a meaningful manner. [Lemus v. Martinez](#), 2019 WY 52, 441 P.3d 831 (Wyo. 2019).

3 [In Interest of D.W.](#), 498 S.W.3d 100 (Tex. App. Houston 1st Dist. 2016); [State v. Lagrone](#), 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636 (2016).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 991. Form of hearing required to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3875, 3879

The Due Process Clause generally requires some form of hearing in making a disposition of property interests.¹ However, the Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of a private interest.² Thus, the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law or indeed even substantial ones are raised.³

No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.⁴ A weighing process is part of any determination of the form of hearing required in particular situations by procedural due process.⁵ It is permissible for the hearing's formality and its procedural requisites to vary, depending upon the importance of the interests involved and the nature of any subsequent proceedings.⁶

For purposes of due process, it is not required that whenever a protectable interest is involved there be some form of traditional adversary, judicial, or administrative hearing before or after deprivation of the interest; due process is flexible, calling for such procedural protections as the particular situation demands, and just as there is no requirement as to exactly what procedures to employ whenever a traditional, judicial-type hearing is mandated, there is no reason to require a judicial-type hearing in all circumstances.⁷ Therefore, the nature and form of a hearing are legitimately open to many potential variations and are a subject for legislation, not adjudication.⁸

The Due Process Clauses do not confer a right to a predeprivation hearing in every case in which a public officer deprives an individual of liberty or property.⁹ While due process ordinarily requires an opportunity for some kind of hearing prior to deprivation of a significant property interest, summary administrative action may be justified in emergency situations.¹⁰ A predeprivation hearing need not approximate a trial-like proceeding; in fact, it may be very limited and still pass constitutional procedural due process muster.¹¹

Practice Tip:

The hearing required by procedural due process depends on (1) the nature of the private interest at stake, (2) the risk of erroneous deprivation given procedures already guaranteed, and whether additional procedural safeguards would prove valuable, and (3) the government's interest and the burdens that additional procedures might impose.¹²

The due process right to trial by jury is not violated by a state's "two-tier" trial system for specified crimes, under which an accused is tried in the lower tier, in which no trial by jury is available, and, if convicted, may make a timely appeal to the second tier in which he or she is entitled to a trial de novo by a jury.¹³

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Footnotes

- 1 [Rein v. Socialist People's Libyan Arab Jamahiriya](#), 568 F.3d 345, 79 Fed. R. Evid. Serv. 1139 (2d Cir. 2009).
- 2 [Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy](#), 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).
- 3 [Federal Communications Commission v. WJR, The Goodwill Station](#), 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).
- 4 [Bridge Aina Le'a, LLC v. Land Use Commission](#), 950 F.3d 610 (9th Cir. 2020).
- 5 [Smith v. Organization of Foster Families For Equality and Reform](#), 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977); [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
- 6 [Parham v. J. R.](#), 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); [Greenholtz v. Inmates of Nebraska Penal and Correctional Complex](#), 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); [Purisch v. Tennessee Technological University](#), 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).
What process must be afforded, pursuant to the due process clause, is determined by the context, dependent upon the nature of the matter or interest involved. [City of Little Rock v. Alexander Apartments, LLC](#), 2020 Ark. 12, 592 S.W.3d 224 (2020).
- 7 [Gilbert v. Homar](#), 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); [Walters v. National Ass'n of Radiation Survivors](#), 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); [Hewitt v. Helms](#), 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).
Proceedings in which a hearing is not required, see § 995.
Due process is a flexible concept, requiring only such procedural protections as the particular situation demands. [Lunon v. Botsford](#), 946 F.3d 425 (8th Cir. 2019); [Simms v. Maryland Department of Health](#), 467 Md. 238, 223 A.3d 1012 (2020); [State v. Sevastopoulos](#), 2020 UT App 6, 458 P.3d 1149 (Utah Ct. App. 2020).

Constitutional due process is an especially elastic concept in that the protections required vary depending upon the importance of the specific property right or liberty interest at stake. [State v. Gonzalez](#), 457 P.3d 938 (Kan. Ct. App. 2019).

8 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

9 [Holly v. Woolfolk](#), 415 F.3d 678 (7th Cir. 2005).

10 [Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.](#), 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

11 [Diamond S.J. Enterprise, Inc. v. City of San Jose](#), 395 F. Supp. 3d 1202 (N.D. Cal. 2019).

12 [Diamond S.J. Enterprise, Inc. v. City of San Jose](#), 395 F. Supp. 3d 1202 (N.D. Cal. 2019) (determination whether a predeprivation hearing is required); [K.M.H.C. v. Barr](#), 2020 WL 614035 (S.D. Cal. 2020); [Tapia v. City of Albuquerque](#), 10 F. Supp. 3d 1323 (D.N.M. 2014); [E.O.H.C. v. Barr](#), 2020 WL 362725 (E.D. Pa. 2020); [State Construction, Inc. v. City of Sammamish](#), 457 P.3d 1194 (Wash. Ct. App. Div. 1 2020).

13 [Ludwig v. Massachusetts](#), 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 992. Hearings on property rights

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West's Key Number Digest

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Some form of hearing is required before an individual is finally deprived of a property interest by the government.¹ The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions.² The fundamental requirement of procedural due process is that a person to be deprived of a property interest be given an opportunity to be heard at a meaningful time and in a meaningful manner.³ The government must provide a litigant with a fair opportunity, under the Due Process Clause, to mount a meaningful defense to the proposed deprivation of its property.⁴ In disposing of property interests, due process requires that each affected individual has had a fundamentally fair chance to present his or her side of the story and to rebut opposing submissions.⁵ In the ordinary case, a citizen has a right to a hearing to contest the forfeiture of his or her property, a right secured by the Due Process Clause and implemented by a federal rule.⁶

Procedural due process safeguards should accompany a situation where the administrative action is adjudicatory in nature and involves substantial property rights.⁷ Accordingly, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing required under due process.⁸ Any significant taking of property by the state is within the purview of the Due Process Clause, and while the length and consequent severity of a deprivation may be factors to weigh in determining the appropriate form of hearing, they are not decisive of the basic right to a prior hearing of some kind.⁹

The due process right to be heard prior to any deprivation of property does not depend upon an advance showing that one will surely prevail at the hearing; the simplicity of the issues involved in determining the ultimate right to continued possession of the property may be relevant to the formality and scheduling of the prior hearing, but it cannot undercut the right to a prior hearing of some kind.¹⁰ The test for due process in the sense of procedural minima requires a comparison of costs and benefits of whatever procedure the plaintiff contends is required.¹¹ However, the ordinary costs in time, effort, and expense imposed by a hearing cannot outweigh the constitutional right to a hearing prior to deprivation of property.¹² The fact that an additional expense will be occasioned by an expanded hearing does not justify denying a hearing which meets the standards of procedural due process¹³ since due process cannot be measured in minutes and hours or in dollars and cents.¹⁴

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Footnotes

- 1 [Lawrence v. Reed](#), 406 F.3d 1224 (10th Cir. 2005); [Supreme Home Health Services, Inc. v. Azar](#), 380 F. Supp. 3d 533 (W.D. La. 2019).
- 2 [McDonald v. Keahey](#), 2019 WL 3980631 (Ala. Civ. App. 2019).
- 3 [Sharp v. Becerra](#), 393 F. Supp. 3d 991 (E.D. Cal. 2019).
It is a fundamental tenet of due process that persons whose property rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. [Dicker v. Dicker](#), 189 Conn. App. 247, 207 A.3d 525 (2019).
- 4 [Energy West Mining Co v. Oliver](#), 555 F.3d 1211 (10th Cir. 2009) (also stating that in some cases, it will be unnecessary for a party to show any specific prejudice in order to establish that it was prevented from mounting a meaningful defense).
- 5 [Rein v. Socialist People's Libyan Arab Jamahiriya](#), 568 F.3d 345, 79 Fed. R. Evid. Serv. 1139 (2d Cir. 2009).
- 6 [Degen v. U.S.](#), 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996), referring to Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(6).
- 7 [McCloskey v. Pennsylvania Public Utility Commission](#), 195 A.3d 1055 (Pa. Commw. Ct. 2018), appeal denied, 207 A.3d 290 (Pa. 2019).
- 8 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 9 [Goss v. Lopez](#), 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 10 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 11 [Van Harken v. City of Chicago](#), 103 F.3d 1346 (7th Cir. 1997).
- 12 [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 13 [Bell v. Burson](#), 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).
- 14 [Taylor v. Hayes](#), 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974).

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16B Am. Jur. 2d Constitutional Law § 993

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

1. In General

§ 993. Particular situations requiring hearing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3879, 4061

The requirement of a hearing in accordance with due process of law applies in a wide variety of proceedings, persons, and subjects, including but not limited to—

- the risks of error inherent in a decision to have a child institutionalized for mental health care.¹
- the taking of private property, the revocation of licenses, the operation of state dispute settlement mechanisms, or the right to government-created jobs held absent any "cause" for termination.²
- confinement that rests on the theory of civil contempt.³
- termination of parental rights to children.⁴
- depriving a citizen of his or her driver's license and vehicle registration.⁵
- termination of public assistance payments.⁶
- deprivation of one's wages through garnishment.⁷
- expulsion of a student from a state university or college.⁸

A city's placement of barricades restricting access to a store from a public street violated the store owners' procedural due process rights, even though the owners were given notice of the barricades, where the city did not provide the owners with a hearing either before or after the placement of the barricades, and there was no showing that it would have been impossible for the city to grant a postdeprivation hearing.⁹ The destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality also violates due process.¹⁰ A driving license may not be suspended or terminated without first affording the licensee a meaningful hearing on the issue as required by the procedural due process guarantees of the federal and state constitutions.¹¹

However, a traveler to Iraq was afforded appropriate due process, in connection with the imposition of a civil fine for violating restrictions on contact with the country, even though a requested testimonial hearing was denied as the traveler was given advance notice of an intent to impose the fine, the reasons for the fine were communicated, and the traveler was given an opportunity to respond; the requested evidentiary hearing was not required; and the traveler was afforded court review of the final administrative decision.¹² Similarly, the procedure of the city's confirmation hearing regarding a local improvement district (LID) assessment did not violate the due process owed to a taxpayer challenging the assessment, where the city, at the conclusion of its initial meeting on accepting the assessment roll, explicitly encouraged the taxpayer to talk to an appraiser and get a second opinion as to whether the LID improvements benefited its property, and the taxpayer was able to question a city appraiser at a later hearing.¹³ Finally, property owners seeking to challenge a city's special assessment to fund a city's fire protection services were not denied procedural due process; the property owners were provided notice, and in addition to the validation hearing, the city publicly discussed the special assessment at four public hearings, and at the validation hearing, the trial court extended the time for property owners to voice their concerns.¹⁴

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Footnotes

- 1 Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979); Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).
- 2 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Spinelli v. City of New York, 579 F.3d 160 (2d Cir. 2009) (a gun shop owner's due process rights were violated when the city suspended her gun dealer's license for about two months and confiscated her firearms inventory, without a postdeprivation hearing or other process); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).
- 3 Pounders v. Watson, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997); McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719 (1972).
- 4 Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).
- 5 Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).
- 6 Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).
- 7 Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).
- 8 Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir. 1961).
- 9 Warren v. City of Athens, Ohio, 411 F.3d 697, 2005 FED App. 0261P (6th Cir. 2005).
- 10 State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).
- 11 Miles v. Shaw, 272 Ga. 475, 532 S.E.2d 373 (2000).
- 12 Karpova v. Snow, 402 F. Supp. 2d 459 (S.D. N.Y. 2005), aff'd, 497 F.3d 262 (2d Cir. 2007).
- 13 Hamilton Corner I, LLC v. City of Napavine, 200 Wash. App. 258, 402 P.3d 368 (Div. 2 2017), as amended, (Sept. 12, 2017).
- 14 Morris v. City of Cape Coral, 163 So. 3d 1174 (Fla. 2015).

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16B Am. Jur. 2d Constitutional Law § 994

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

1. In General

§ 994. Conditions and restrictions on hearings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3879

Since an individual's due process right to an opportunity to be heard does not ensure a hearing in all contexts,¹ reasonable conditions may be imposed on the right to a hearing or to access to the courts, generally,² such as by requiring security.³ A plaintiff who asserts the right to hearing under the Due Process Clause must show that facts he or she seeks to establish in that hearing are relevant under the applicable statutory scheme.⁴

Durational residency requirements may be imposed as a condition precedent to bringing certain types of actions, such as those for divorce.⁵ Similarly, due process of law does not compel a state to open its courts to suits by foreign corporations on transitory causes of action occurring elsewhere.⁶

On the other hand, the requirements of due process are not met where the right to a hearing is granted only on conditions so harsh and oppressive as to be tantamount to a denial of the right.⁷ Generally, state restraints upon access to the courts will be invalidated when they are so arbitrary, unequal, and oppressive as to shock the sense of fairness the 14th Amendment was intended to satisfy.⁸

A state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay.⁹ The rule that the Due Process Clause of the 14th Amendment prohibits a state from denying indigent divorce plaintiffs access to its courts, solely on the basis of an inability to

pay court fees and costs, includes the costs of service of summons by publication which are to be paid by the local governing unit.¹⁰ Nonetheless, a requirement that an indigent pay filing fees for voluntary bankruptcy is not unconstitutional.¹¹

The application of Rules on Lawyer Disciplinary Enforcement, requiring that evidence developed in disciplinary proceedings and investigations prior to the filing of a formal complaint be kept confidential, did not deprive attorneys of their due process rights, based on the alleged effect of precomplaint confidentiality on their ability to prepare for cases before the Commission on Practice, where the attorneys were given detailed formal complaints, allowed to discover adverse witnesses and proposed hearing exhibits; where neither attorney claimed surprise at the evidence presented; and where any evidence that came to light during the informal investigation but did not relate to matters included in the formal complaint and did not enter into ultimate outcome.¹²

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Footnotes

- 1 Elliott v. Kiesewetter, 98 F.3d 47, 35 Fed. R. Serv. 3d 742 (3d Cir. 1996).
- 2 Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921); Gulf, C. & S. F. Ry. Co. v. State of Texas, 246 U.S. 58, 38 S. Ct. 236, 62 L. Ed. 574 (1918).
- 3 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921).
- 4 Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).
- 5 Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975); Davis v. Davis, 297 Minn. 187, 210 N.W.2d 221 (1973).
- 6 Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio L. Abs. 146 (1952).
- 7 St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919); Wadley Southern Ry. Co. v. State of Georgia, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1915).
- 8 Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 43 S. Ct. 55, 67 L. Ed. 115 (1922).
- 9 Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
- 10 Deason v. Deason, 32 N.Y.2d 93, 343 N.Y.S.2d 321, 296 N.E.2d 229 (1973).
- 11 U.S. v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).
- 12 Goldstein v. Commission on Practice of Supreme Court, 2000 MT 8, 297 Mont. 493, 995 P.2d 923 (2000).

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16B Am. Jur. 2d Constitutional Law § 995

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XIV. Due Process of Law

D. Hearing

1. In General

§ 995. Proceedings in which hearing is not required

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879, 3881, 4027

Due process of law does not require a hearing in every conceivable case of government impairment of a private interest.¹ The due process right to a prior hearing attaches only to the deprivation of an interest encompassed within the 14th Amendment's protection.² For purposes of the Due Process Clause requirement that a person be given the opportunity to be heard, no process is due if one is not deprived of life, liberty, or property.³ Furthermore, due process does not require that the defendant in every civil case actually have a hearing on the merits.⁴ A federal trial court is not required to hold a hearing to comply with procedural due process, but may do so if the court believes the hearing would assist the court to resolve the case.⁵

Eliminating the due process right to a hearing can be constitutional, where there is an adequate administrative process in place.⁶ Additionally, there is no inexorable due process requirement that oral testimony must be heard in every administrative proceeding in which it is tendered.⁷ Written submissions may substitute oral presentation for due process purposes as long as the deprived party has the opportunity to be heard at a meaningful time and in a meaningful way.⁸ Dismissal of a convict from a position as a head inmate clerk did not deprive the convict of any property right without due process in view of the fact that prison officials were entitled to remove the convict from the position at any time without an investigation or hearing.⁹ The Due Process Clause of the 14th Amendment does not require a state to provide for an automatic hearing in every case of removing a foster child from a foster home, even when the foster parents choose not to seek one.¹⁰

In limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible where (1) the seizure is directly necessary to secure an important governmental or general public interest; (2) there is a special need for very prompt action; and (3) the state keeps strict control over its monopoly of legitimate force, that is, the person initiating the seizure is a government official responsible for determining, under the standards of a narrowly drawn statute, that a seizure without a prior hearing is necessary and justified in the particular instance.¹¹ Thus, for instance, due process does not require a prior hearing where an emergency situation exists and an administrative agency takes some action to protect the public against economic injury.¹² Likewise, if public safety is at issue, liberty or property interests can be deprived even without a prior hearing.¹³ For example, social workers could remove seven- and nine-year-old girls from their parents' home without a prior hearing due to exigent circumstances without violating procedural due process requirements when one child displayed bruises consistent with beatings and the second child was found alone in the apartment.¹⁴

The central demands of procedural due process are an opportunity to be heard at a meaningful time and in a meaningful manner, and such requirements are implicated only by adjudications, not by state actions that are legislative in character.¹⁵ The Due Process Clause does not entitle people to hearings at which they will contest the wisdom of substantive legislative choices.¹⁶ In other words, due process under the Fourteenth Amendment does not require any hearing or participation in legislative decision-making other than that afforded by judicial review after rule promulgation.¹⁷ Many acts of government¹⁸ are validly exercised without a hearing, especially if the matter is subject to revision in the courts, and no opportunity to be heard need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge.¹⁹ Thus, legislation which meets the test of a proper exercise of the police power will not be struck down on the ground that because of deficiencies respecting notice and hearing, it does not comport with the requirements of due process.²⁰

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Footnotes

- 1 [Federal Deposit Ins. Corp. v. Mallen](#), 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988); [Cleland v. National College of Business](#), 435 U.S. 213, 98 S. Ct. 1024, 55 L. Ed. 2d 225 (1978); [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
- 2 [Codd v. Velger](#), 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); [Fuentes v. Shevin](#), 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
- 3 [Cancino Castellar v. McAleenan](#), 388 F. Supp. 3d 1218 (S.D. Cal. 2019).
- 4 [Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); [United States v. Batato](#), 833 F.3d 413 (4th Cir. 2016); [Prime Rate Premium Finance Corporation, Inc. v. Larson](#), 930 F.3d 759, 104 Fed. R. Serv. 3d 365 (6th Cir. 2019).
- 5 [Allen v. United States](#), 145 Fed. Cl. 390 (2019).
- 6 [Martinez v. McAleenan](#), 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019).
- 7 [Biliski v. Red Clay Consol. School Dist. Bd. of Educ.](#), 574 F.3d 214, 247 Ed. Law Rep. 624 (3d Cir. 2009).
- 8 [Floyd v. Board of Ada County Commissioners](#), 164 Idaho 659, 434 P.3d 1265 (2019).
- 9 [Duval v. Smith](#), 50 A.D.2d 1066, 375 N.Y.S.2d 711 (4th Dep't 1975).
- 10 [Smith v. Organization of Foster Families For Equality and Reform](#), 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
- 11 [Calero-Toledo v. Pearson Yacht Leasing Co.](#), 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974) (holding that Puerto Rico could, without any notice or hearing, seize a yacht on which marijuana was transported by its lessees without the knowledge of the owner/lessor).
- 12 [Sierra Life Ins. Co. v. Rottman](#), 95 Nev. 654, 601 P.2d 56 (1979).
- 13 [McCormick v. Stalder](#), 105 F.3d 1059 (5th Cir. 1997).
- 14 [Park v. City of New York](#), 2003 WL 133232 (S.D. N.Y. 2003).
- 15 [Sutton v. Bickell](#), 220 A.3d 1027 (Pa. 2019).

16 [Mascow v. Board of Education of Franklin Park School District No. 84](#), 950 F.3d 993 (7th Cir. 2020).
17 [Edelhertz v. City of Middletown](#), 943 F. Supp. 2d 388 (S.D. N.Y. 2012), [aff'd](#), 714 F.3d 749 (2d Cir. 2013).
18 [Monamotor Oil Co. v. Johnson](#), 292 U.S. 86, 54 S. Ct. 575, 78 L. Ed. 1141 (1934) (revocation of a motor
 vehicle fuel distributors' license).
19 [37712, Inc. v. Ohio Dept. of Liquor Control](#), 113 F.3d 614, 1997 FED App. 0158P (6th Cir. 1997).
20 [Wasservogel v. Meyerowitz](#), 300 N.Y. 125, 89 N.E.2d 712 (1949).

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16B Am. Jur. 2d Constitutional Law § 996

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XIV. Due Process of Law

D. Hearing

1. In General

§ 996. Proceedings in which hearing not required—Waiver or loss of right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879

The due process right to a hearing prior to a civil judgment is subject to waiver,¹ provided that such a waiver is made voluntarily, intelligently, and knowingly and with awareness of the legal consequences.² Moreover, the waiver must be clear and unequivocal.³

Such a waiver may arise by contract, as in the case of a debt instrument containing a cognovit provision, authorized under state law, whereby the holder, upon the debtor's default, could designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record,⁴ or it may arise by a consent decree entered into by the parties to a case after careful negotiation.⁵

Any right to a hearing may also be lost by delay.⁶ The fact that opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied.⁷ A state can enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication.⁸

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Footnotes

- 1 D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972); *Cliff v. Board of School Com'rs of City of Indianapolis, Ind.*, 42 F.3d 403, 96 Ed. Law Rep. 365 (7th Cir. 1994).
- 2 D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).
- 3 *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 616 F.2d 420 (9th Cir. 1980).
- 4 D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).
- 5 *U.S. v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971).
- 6 *O'Neil v. Northern Colorado Irr. Co.*, 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123 (1916) (holding that there is no denial of due process in a provision that if the person affected takes no steps to assert his or her rights within four years after the judicial assertion of an adverse title, he or she will lose those rights).
- 7 *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932).
- 8 *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); *McLaughlin v. State, Bureau of Motor Vehicles*, 43 Ohio Misc. 29, 72 Ohio Op. 2d 295, 334 N.E.2d 8 (C.P. 1975).

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 997. Conduct of hearing under due process requirements, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879 to 3881

The proceeding or hearing requisite to due process must be appropriate,¹ fair,² adequate,³ and such as is practicable and reasonable in the particular case.⁴

A fair trial in fair tribunal is a basic requirement of due process.⁵

Observation:

The trial of the case is unquestionably one of the meaningful occasions at which the parties must be given an opportunity to be heard to satisfy procedural due process.⁶

All that is necessary to comply with due process is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard to ensure that they are given a meaningful opportunity to present their case.⁷ Although due process requires some form of hearing prior to a final deprivation of a protected property interest, the exact nature and mechanism of the required procedure will vary; the unique circumstances surrounding the controversy determine the minimal requirements.⁸ The specific requirements of procedural due process depend on the facts of each case, and could encompass any number of the following components: (1) notice of the basis for the government action; (2) a neutral decision maker; (3) the opportunity to orally present a case against the state; (4) the opportunity to present evidence and witnesses against the state; (5) the opportunity to cross-examine witnesses; (6) the right to have an attorney present at the hearing; and (7) a decision based on the evidence presented at the hearing accompanied by an explanation of the decision.⁹

Due process does not mean litigants are entitled to unlimited amount of the court's time.¹⁰

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Footnotes

- 1 [Bell v. Burson](#), 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); [Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); [Beaudreau v. Superior Court](#), 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713 (1975).
- 2 [Irvin v. Dowd](#), 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); [Juster Bros. v. Christgau](#), 214 Minn. 108, 7 N.W.2d 501 (1943); [Merritt v. Swope](#), 267 A.D. 519, 46 N.Y.S.2d 944 (1st Dep't 1944).
In the civil context, structural error, which requires per se reversal, typically occurs when the trial court violates a party's right to due process by denying the party a fair hearing. [Severson & Werson, P.C. v. Sepehry-Fard](#), 37 Cal. App. 5th 938, 249 Cal. Rptr. 3d 839 (6th Dist. 2019).
- 3 [Link v. Wabash R. Co.](#), 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 (1962); [State v. Industrial Tool & Die Works](#), 220 Minn. 591, 21 N.W.2d 31 (1945); [Butler v. State](#), 217 Miss. 40, 63 So. 2d 779 (1953).
- 4 [Geo S Bush & Co v. U S](#), 22 Cust. Ct. 158, 135 F. Supp. 696 (Cust. Ct. 1 Div. 1949).
- 5 [Caperton v. A.T. Massey Coal Co., Inc.](#), 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (stating that due process may sometimes bar a trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties); [Echavarria v. Filson](#), 896 F.3d 1118 (9th Cir. 2018), cert. denied, 139 S. Ct. 2613, 204 L. Ed. 2d 276 (2019); [Saucon Valley Manor, Inc. v. Miller](#), 392 F. Supp. 3d 554 (E.D. Pa. 2019); [People v. Roehrs](#), 2019 COA 31, 440 P.3d 1231 (Colo. App. 2019); [People v. Towns](#), 33 N.Y.3d 326, 102 N.Y.S.3d 151, 125 N.E.3d 816 (2019); [Citibank, N.A. v. Hine](#), 2019-Ohio-464, 130 N.E.3d 924 (Ohio Ct. App. 4th Dist. Ross County 2019), appeal not allowed, 156 Ohio St. 3d 1406, 2019-Ohio-2261, 123 N.E.3d 1038 (2019); [State v. Decosimo](#), 555 S.W.3d 494 (Tenn. 2018), cert. denied, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019); [Matter of Dependency of A.E.T.H.](#), 9 Wash. App. 2d 502, 446 P.3d 667 (Div. 1 2019).
- 6 [Howell v. Jurgens](#), 264 So. 3d 1233 (La. Ct. App. 2d Cir. 2019).
- 7 [Aden v. Nielsen](#), 409 F. Supp. 3d 998 (W.D. Wash. 2019); [JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist.](#), 30 Cal. App. 5th 945, 242 Cal. Rptr. 3d 197 (2d Dist. 2018).
- 8 [Peace v. Employment Sec. Com'n of North Carolina](#), 349 N.C. 315, 507 S.E.2d 272 (1998).
- 9 [Matter of Behles](#), 2019-NMSC-016, 450 P.3d 920 (N.M. 2019).
As to notice, generally, see §§ 973 to 986.
Regarding the requirement of impartiality, see §§ 1011 to 1015.
As to the right to introduce evidence, see § 1004.
As to the right to cross-examine witnesses, see § 1005.
For discussion of the right to counsel, see § 999.
Due process requires adequate notice, a realistic opportunity to appear at a hearing, and the right to participate in a meaningful manner before one's rights are irretrievably altered. [Matter of L.C.P.](#), 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019).

10

Due process requires a fair hearing, which includes reasonable notice of the opposing party's claims and an opportunity to rebut those claims. [Matter of Estate of Bartelson, 2019 ND 107, 925 N.W.2d 416 \(N.D. 2019\)](#). [Pittman v. Flanagan, 287 So. 3d 721 \(La. Ct. App. 1st Cir. 2019\)](#).

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16B Am. Jur. 2d Constitutional Law § 998

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 998. Requirement of full evidentiary hearing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879, 3882

A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.¹ However, due process does not mandate full evidentiary hearings on all matters, and not all situations calling for procedural safeguards call for the same kind of procedure;² an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances.³ There is no per se rule that an evidentiary hearing is required whenever a liberty or property interest, protected by due process, may be affected.⁴ The parties' due process right to be heard may be fulfilled by the court's review of the briefs and supporting affidavits and materials submitted to the court.⁵ In determining whether due process requires an evidentiary hearing, two factors that counsel in favor of a hearing are whether the court must resolve a dispute of material fact or weigh the credibility of witnesses.⁶ Nonetheless, the hearing provided must be an orderly proceeding, adapted to the nature of the case,⁷ in which the person to be affected has an opportunity to defend,⁸ enforce, and protect his or her rights.⁹

Insofar as administrative proceedings are concerned, ordinarily, for purposes of due process, something less than an evidentiary hearing is sufficient prior to adverse administrative action.¹⁰ Due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body, but discretionary decisions involving potentially minor or limited incursions of property rights call for only limited procedural safeguards.¹¹ Although some kind of prior hearing may be necessary to guard against arbitrary impositions on interests protected by the 14th Amendment, nevertheless, where the state has preserved what has always been the law of the land, the case for administrative safeguards is significantly less compelling.¹²

Footnotes

- 1 [Akron, C. & Y. Ry. Co. v. U.S.](#), 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923).
- 2 [Property Asset Management, Inc. v. Lazarte](#), 163 Conn. App. 737, 138 A.3d 290 (2016) (so long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens under the guise of due process).
Procedural due process does not require an evidentiary hearing on a motion when the legal claims do not turn on disputed facts. [State v. Hidalgo](#), 241 Ariz. 543, 390 P.3d 783 (2017), cert. denied, 138 S. Ct. 1054, 200 L. Ed. 2d 496 (2018).
- 3 [Hargis v. Hargis](#), 2019 Ark. 321, 587 S.W.3d 208 (2019).
- 4 [Mikucka v. St. Lucian's Residence, Inc.](#), 183 Conn. App. 147, 191 A.3d 1083 (2018).
- 5 [Hymas v. United States](#), 141 Fed. Cl. 735 (2019).
- 6 [In re Estate Boland](#), 2019 MT 236, 397 Mont. 319, 450 P.3d 849 (2019).
- 7 [Yolanda S. v. Illinois Department of Children and Family Services](#), 2019 IL App (1st) 171853, 431 Ill. Dec. 719, 128 N.E.3d 389 (App. Ct. 1st Dist. 2019); [Charles Tolmas, Inc. v. Police Jury of Parish of Jefferson](#), 231 La. 1, 90 So. 2d 65 (1956); [Edwards v. City of Sallisaw](#), 2014 OK 86, 339 P.3d 870 (Okla. 2014); [State ex rel. Adams v. Superior Court of State, Pierce County](#), 36 Wash. 2d 868, 220 P.2d 1081 (1950); [Simpson v. Stanton](#), 119 W. Va. 235, 193 S.E. 64 (1937).
- 8 [George Moore Ice Cream Co. v. Rose](#), 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933); [Phoenix Metals Corp. v. Roth](#), 79 Ariz. 106, 284 P.2d 645 (1955) (overruled in part on other grounds by, [Coulas v. Smith](#), 96 Ariz. 325, 395 P.2d 527 (1964)); [In re Buchman's Estate](#), 123 Cal. App. 2d 546, 267 P.2d 73, 47 A.L.R.2d 291 (2d Dist. 1954).
- 9 [George Moore Ice Cream Co. v. Rose](#), 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933); [American Surety Co. v. Baldwin](#), 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932); [Lyons v. Goldstein](#), 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).
- 10 [Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); [Dixon v. Love](#), 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); [Mathews v. Eldridge](#), 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); [Williams v. Board of Supervisors, Louisiana Community & Technical College Systems](#), 272 So. 3d 84, 367 Ed. Law Rep. 656 (La. Ct. App. 3d Cir. 2019).
- 11 [McIntyre v. Securities Commissioner of South Carolina](#), 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018), cert. denied, (June 28, 2019).
- 12 [Ingraham v. Wright](#), 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

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16B Am. Jur. 2d Constitutional Law § 999

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 999. Presence of person at trial and right to counsel under due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879

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[Appointment of counsel for attorney facing disciplinary charges, 86 A.L.R.4th 1071](#)

[Right of indigent defendant in paternity suit to have assistance of counsel at state expense, 4 A.L.R.4th 363](#)

[Right to counsel in contempt proceedings, 52 A.L.R.3d 1002](#)

[Comment Note.—Right to assistance by counsel in administrative proceedings, 33 A.L.R.3d 229](#)

A party in a civil action may choose not to be present at the trial of the case and to be represented solely by counsel.¹ It is not essential to the jurisdiction of the court that the parties be present at all times during the trial.² Parties must be given the opportunity to be present, but if that opportunity is given, their absence during the trial does not affect the right to proceed.³ Likewise, an accused has a fundamental right, as a matter of due process, to be present at all critical stages of his or her criminal trial.⁴ Of course, any impairment of a defendant's credibility caused by the defendant's mandatory presence at trial does not violate due process.⁵ However, the presence of a defendant at a critical stage of trial is a condition of due process to the extent that a fair and just hearing would be thwarted by his or her absence and to that extent only.⁶

Practice Tip:

The defendant's presence is not required, under the Due Process Clause and the applicable rule, for the correction of an illegal sentence, correction of a clerical error in a sentence, or resentencing pursuant to a mandate from the appellate court to resentence the defendant to the same sentence originally imposed while correcting other errors.⁷

Denying a criminal defendant access to counsel is a denial of due process of law, under both the federal and state constitutions.⁸

There is no general or absolute right to counsel in civil cases,⁹ particularly where a defendant's deprivation of liberty is not at stake.¹⁰ The stringent standards of appointment and effective assistance of counsel mandated by the Sixth Amendment do not apply to civil proceedings.¹¹ The constitutional right to appointed counsel provided for in the state and federal Constitutions generally is guaranteed only in criminal prosecutions, and the guarantee ordinarily does not, by virtue of the specific language of these provisions, apply to civil proceedings.¹² Nonetheless, there is a right to the appointment and assistance of counsel in various types of civil or administrative proceedings.¹³

A state court judge did not violate a patient's procedural due process rights in refusing to appoint independent attorney to represent the patient's interests in proceedings to determine whether to remove her artificial life support; the patient's life and liberty interests were adequately protected by the extensive process provided in the state courts, and the parties thoroughly advocated their competing perspectives on the patient's wishes.¹⁴

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Footnotes

- 1 Am. Jur. 2d, Trial § 159.
- 2 Am. Jur. 2d, Trial § 159.
- 3 Am. Jur. 2d, Trial § 159.
- 4 *State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, 873 N.E.2d 1263 (2007).
- 5 *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000) (holding that the prosecution's comments during summation regarding the defendant's presence at trial and on the ability to fabricate that his presence afforded him did not deprive the defendant of due process even though a state statute required the defendant to be present at trial).
- 6 *State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, 873 N.E.2d 1263 (2007).
- 7 *U.S. v. Saenz*, 429 F. Supp. 2d 1109 (N.D. Iowa 2006).
- 8 *Cooke v. State*, 97 A.3d 513 (Del. 2014).
- 9 *Kinnan v. Sitka Counseling*, 349 P.3d 153 (Alaska 2015); *Stewart v. Rice*, 2013 MT 55, 369 Mont. 203, 296 P.3d 1174 (2013).
- 10 *Stewart v. Rice*, 2013 MT 55, 369 Mont. 203, 296 P.3d 1174 (2013).
- 11 *Watson v. Moss*, 619 F.2d 775 (8th Cir. 1980).
- 12 *Borror v. Department of Investment*, 15 Cal. App. 3d 531, 92 Cal. Rptr. 525 (1st Dist. 1971).

- 13 [M.L.B. v. S.L.J.](#), 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (termination of parental status); [International Union, United Mine Workers of America v. Bagwell](#), 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994); [Lassiter v. Department of Social Services of Durham County, N. C.](#), 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (termination of parental status); [Humphrey v. Cady](#), 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972) (involuntary commitment to a mental institution); [Boddie v. Connecticut](#), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (holding that due process prohibits a state from denying, solely because of an inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages).
- 14 [Schiavo ex rel. Schindler v. Schiavo](#), 357 F. Supp. 2d 1378 (M.D. Fla. 2005), [aff'd](#), 403 F.3d 1223 (11th Cir. 2005).

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16B Am. Jur. 2d Constitutional Law § 1000

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 1000. Right to raise issues and defenses under due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.¹ Specifically, due process guarantees that every person be given an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life, liberty, or property.² Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained.³ The Constitution requires a certain modicum of adversary procedure even if the outcome is a foregone conclusion; access to the courts is an essential ingredient of the constitutional guarantee of due process.⁴

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues.⁵ Due process requires that there be an opportunity to present every available defense,⁶ and a hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law.⁷ However, due process is not violated by state procedures denying defendants the opportunity to put in defenses in that action so long as their claims can be raised elsewhere within the judicial system.⁸

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Footnotes

- 1 [Turner v. State](#), 261 So. 3d 729 (Fla. 2d DCA 2018).
In state administrative proceedings, due process requires that parties be accorded a full and fair hearing on
disputed fact issues. [McNeill v. Phillips](#), 585 S.W.3d 109 (Tex. App. Houston 14th Dist. 2019), petition for
review filed, (Jan. 2, 2020).
- 2 [Pena v. Rodriguez](#), 273 So. 3d 237 (Fla. 3d DCA 2019); [State v. Johns](#), 2019 MT 292, 398 Mont. 152, 454
P.3d 692 (2019).
- 3 [Dicker v. Dicker](#), 189 Conn. App. 247, 207 A.3d 525 (2019).
- 4 [In re S.M.H.](#), 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807 (2019).
- 5 [Holt v. Virginia](#), 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965).
- 6 [Philip Morris USA Inc. v. Scott](#), 561 U.S. 1301, 131 S. Ct. 1, 177 L. Ed. 2d 1040 (2010); [Lindsey v. Normet](#),
405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); [American Surety Co. v. Baldwin](#), 287 U.S. 156, 53 S.
Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932).
- 7 [Tomayko v. Thomas](#), 143 So. 2d 227 (Fla. 3d DCA 1962).
- 8 [Lindsey v. Normet](#), 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972).

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16B Am. Jur. 2d Constitutional Law § 1001

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XIV. Due Process of Law


D. Hearing

2. Character and Sufficiency of Hearing

§ 1001. Time of hearing under due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Although a party must not be deprived of his or her property without a judicial hearing, the stage of the proceedings at which that hearing is to take place and the manner in which the cause of a party is to be brought before the judicial tribunal, provided that it is not an unreasonably inconvenient and embarrassing one, are matters within the legislative power.¹ Although due process of law implies not merely an opportunity to be heard but also an opportunity to be heard with reasonable promptness,² where only property rights are involved, the usual rule is that the mere postponement of a judicial inquiry into liability is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate.³

Observation;

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.⁴

Under the principle that the formality and procedural requisites for a due process hearing can vary, depending on the importance of the interest involved and the nature of the subsequent proceedings, the possible length of wrongful deprivation of benefits is an important factor in assessing the impact of official action on the private interests; thus, the rapidity of administrative review of the denial of benefits is a significant factor in assessing the constitutional sufficiency of the entire process.⁵ However, due process is not denied where postponement of a hearing is necessary to protect the public from contaminated food, from a bank failure, from misbranded drugs, to aid the collection of taxes, or to aid the war effort.⁶

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Footnotes

- 1 Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Hutchins v. Board of Sup'rs of Alcorn County, 227 Miss. 766, 87 So. 2d 54 (1956); Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).
- 2 Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979).
- 3 Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974); Goldenthal v. New York Tel. Co., 68 Misc. 2d 749, 327 N.Y.S.2d 732 (Sup 1972), order aff'd, 40 A.D.2d 825, 337 N.Y.S.2d 495 (2d Dep't 1972).
- 4 Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Ritter v. Cecil County Office of Housing and Community Development, 33 F.3d 323 (4th Cir. 1994).
- 5 Fusari v. Steinberg, 419 U.S. 379, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975).
- 6 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

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16B Am. Jur. 2d Constitutional Law § 1002

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 1002. Time of hearing under due process requirements —Predeprivation and postdeprivation hearing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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[Construction and Application of Parratt-Hudson Doctrine, Providing That Where Deprivation of Property Interest Is Occasioned by Random and Unauthorized Conduct of State Officials, Procedural Due Process Inquiry Is Limited to Issue of Adequacy of Postdeprivation Remedies Provided by State, 89 A.L.R.6th 1](#)

The opportunity to be heard in a meaningful time and in a meaningful manner may include the right to a predetermination hearing absent emergency circumstances.¹ However, due process does not always require a state to provide a predeprivation hearing prior to an initial deprivation of property.² When a postdeprivation hearing not only is feasible but will give the deprived individual a completely adequate remedy, due process does not require a right to a predeprivation hearing as well.³ However, in situations where a state can feasibly provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of any postdeprivation tort remedy to compensate for the taking.⁴

When a state official commits acts that are random and unauthorized, procedural due process makes the state responsible only for providing postdeprivation remedies, because the state cannot feasibly provide for predeprivation process when the deprivation arises from random and unauthorized conduct.⁵ There is no loss of property without due process if a state provides an adequate postdeprivation remedy for the loss.⁶

Additionally, failure to provide a predeprivation hearing does not violate due process in situations where a government official reasonably believed that immediate action was necessary to eliminate an emergency situation and the government provided adequate postdeprivation process.⁷ In situations where a state feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking, but postdeprivation process can satisfy due process in limited cases when prompt action is required, an important government interest is involved, and there is a substantial assurance that the deprivation is not baseless or unwarranted.⁸ Where the State acts to abate an emergent threat to public safety, postdeprivation process satisfies the Constitution's procedural due process requirement.⁹ Whether a situation warrants postponement of a predeprivation hearing depends on a balancing of the importance of the private interest affected by the governmental action, the government's interest, and the risk of an erroneous deprivation.¹⁰ Moreover, in determining what process is due, an account must be taken of the length and finality of the deprivation.¹¹ Thus, an important governmental interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demand prompt action justifying postponing the opportunity to be heard until after the initial deprivation; in determining how long a delay is justified in affording a postsuspension hearing and decision, it is appropriate to examine the importance of the private interest and harm to that interest occasioned by the delay, the justification offered by the government for the delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been mistaken.¹²

Similarly, while a prior hearing is normally a prerequisite to the state's interference with a person's liberty, it may be delayed until some time after the deprivation has taken place,¹³ particularly where there is a compelling state interest to warrant the postponement.¹⁴ Thus, for example, due process was not violated by a city's 30-day delay in holding a hearing after a vehicle was towed; the private interest affected was the vehicle owner's interest in maintaining the use of the money between the time of paying impoundment and towing fees and the time of the hearing and the temporary deprivation of the use of the automobile itself, the delay in presenting evidence was unlikely to spawn significant factual errors and the straightforward nature of the issue of whether the car was illegally parked revealed little likelihood of erroneous deprivation, and the nature of the government interest in delay, one of administrative necessity, argued strongly in the city's favor.¹⁵ Likewise, a state procedure for the removal of foster children from foster homes, under which foster parents are entitled to a preremoval conference and a postremoval hearing but are not entitled to a preremoval judicial hearing except as to children who have been in their foster care for 18 months or more, is not constitutionally inadequate by reason of the 18-month limitation, since the state legislature can properly determine that 18 months was the time at which temporary foster care begins to turn into a more permanent and family-like setting requiring procedural protection and/or judicial inquiry into the propriety of continuing foster care.¹⁶

Nonetheless, extraordinarily long delays may render a postdeprivation remedy inadequate for purposes of due process analysis.¹⁷ For example, allegations that a minor child who was the suspected victim of physical abuse was removed from his parents and placed in protective custody with his maternal grandmother without a court order and that postdeprivation proceedings were not conducted until approximately seven weeks later supported a procedural due process claim against a county employee who investigated the allegations of abuse and placed the child with the grandmother.¹⁸

The required hearing is afforded where the judgment or order affecting liberty or property, although not itself preceded by a hearing, is reviewable in proceedings in which there is the right to be heard.¹⁹ However, the view that due process does not require an opportunity to be heard before judgment if defenses may be presented upon appeal assumes that the appellate

review affords an opportunity to present all available defenses, including a lack of proper notice, to justify the judgment or order complained of.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Under the *Parratt-Hudson* doctrine, a state actor's random and unauthorized deprivation of an interest protected by procedural due process cannot be challenged under § 1983 if the state provides an adequate post-deprivation remedy. [U.S. Const. Amend. 14](#); [42 U.S.C.A. § 1983](#). [Dean for and on behalf of Harkness v. McKinney](#), 976 F.3d 407 (4th Cir. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Melton v. City of Oklahoma City](#), 879 F.2d 706 (10th Cir. 1989), on reh'g, 928 F.2d 920 (10th Cir. 1991).
- 2 [Gilbert v. Homar](#), 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Due process does not necessarily require a hearing before property is taken. [Clear Springs Foods, Inc. v. Spackman](#), 150 Idaho 790, 252 P.3d 71 (2011).
- 3 [Ellis v. Sheahan](#), 412 F.3d 754 (7th Cir. 2005).
- 4 [Connecticut v. Doeher](#), 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991); [Zinerman v. Burch](#), 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).
- 5 [Bolton v. Bryant](#), 71 F. Supp. 3d 802 (N.D. Ill. 2014).
Due process does not require predeprivation notice-and-hearing process when the state is in no position to provide it because the deprivation was due to an official's random or unauthorized act. [DiLuzio v. Village of Yorkville, Ohio](#), 796 F.3d 604 (6th Cir. 2015).
Where the alleged deprivation arises from an unauthorized act of a governmental employee, it will not support a due process claim if adequate postdeprivation remedies are available. [Your Place, LLC v. City of Troy](#), 122 A.D.3d 1148, 997 N.Y.S.2d 529 (3d Dep't 2014).
- 6 [Money Market Pawn, Inc. v. Wirth](#), 32 F. Supp. 3d 903 (N.D. Ill. 2014).
- 7 [United Pet Supply, Inc. v. City of Chattanooga, Tenn.](#), 768 F.3d 464 (6th Cir. 2014).
- 8 [Shinault v. Hawks](#), 782 F.3d 1053 (9th Cir. 2015).
- 9 [Amaya v. City of San Antonio](#), 980 F. Supp. 2d 771 (W.D. Tex. 2013).
- 10 [First Nat. Bank & Trust, Wibaux, Mont. v. Department of Treasury, Comptroller of Currency](#), 63 F.3d 894 (9th Cir. 1995).
- 11 [Gilbert v. Homar](#), 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
- 12 [Federal Deposit Ins. Corp. v. Mallen](#), 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (holding also that even though there is a point at which an unjustified delay in completing a postdeprivation proceeding would become a constitutional violation, the significance of such a delay cannot be evaluated in a vacuum).
- 13 [Burns v. Swenson](#), 430 F.2d 771 (8th Cir. 1970).
- 14 [Mignone v. Vincent](#), 411 F. Supp. 1386 (S.D. N.Y. 1976); [Stricklin v. Regents of University of Wisconsin](#), 297 F. Supp. 416 (W.D. Wis. 1969); [In re Coates](#), 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).
- 15 [City of Los Angeles v. David](#), 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).
- 16 [Smith v. Organization of Foster Families For Equality and Reform](#), 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
- 17 [Cronin v. Town of Amesbury](#), 81 F.3d 257, 34 Fed. R. Serv. 3d 1496 (1st Cir. 1996).
- 18 [Brown v. Daniels](#), 128 Fed. Appx. 910 (3d Cir. 2005).

19 Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); C.V.C. v. Superior Court, 29 Cal.
App. 3d 909, 106 Cal. Rptr. 123 (3d Dist. 1973); In re Braier's Estate, 305 N.Y. 148, 111 N.E.2d 424 (1953).
20 Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

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16B Am. Jur. 2d Constitutional Law § 1003

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1003. Necessity under due process requirements of evidence in hearing, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3882, 3883

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[Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Evidence Other Than Weapons or Personal Items, 56 A.L.R.6th 185](#)

[Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Personal Items Other Than Weapons, 55 A.L.R.6th 391](#)

[Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Weapons, 53 A.L.R.6th 81](#)

[Failure of State Prosecutor to Disclose Existence of Plea Bargain or Other Deals with Witness as Violating Due Process, 12 A.L.R.6th 267](#)

[Failure of State Prosecutor to Disclose Pretrial Statement Made by Crime Victim as Violating Due Process, 102 A.L.R.5th 327](#)

[Failure of State Prosecutor to Disclose Exculpatory Medical Reports and Tests as Violating Due Process, 101 A.L.R.5th 187](#)

[Failure of State Prosecutor to Disclose Exculpatory Ballistic Evidence as Violating Due Process, 95 A.L.R.5th 611](#)

[Failure of State Prosecutor to Disclose Fingerprint Evidence as Violating Due Process, 94 A.L.R.5th 393](#)

[Failure of State Prosecutor to Disclose Exculpatory Photographic Evidence as Violating Due Process, 93 A.L.R.5th 527](#)

[Comment Note.—Hearsay evidence in proceedings before federal administrative agencies, 6 A.L.R. Fed. 76](#)

Procedural due process ordinarily requires decisions that would deprive a person of a liberty or property interest to be based on a modicum of evidence.¹ In an adjudicative context, due process entitles a person to a fact finding based on the record produced before a decision maker and disclosed to that person and an individualized determination of their interests; it also requires that the decision maker actually consider the evidence and the argument that the party presents.² Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules,³ except in those rare instances where countervailing government interests dictate that such information should remain secret.⁴

Under the Due Process Clause of the Federal Constitution, an opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing.⁵

Admission of generic penalty phase testimony of a capital-murder defendant's ex-wife concerning prior unadjudicated violent conduct did not violate the defendant's right to due process, where the defendant received adequate notice of the evidence to be introduced and had a reasonable opportunity to respond; the defendant received notice through the prosecution's filing of a written notice of intent to offer evidence of the defendant's sexual and physical assaults upon his ex-wife, and through the ex-wife's sworn statement to prosecution and her testimony at a hearing held to determine the admissibility thereof, the defendant had an opportunity to confront his ex-wife at trial, and the jury was instructed as to the reasonable doubt requirement.⁶

There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.⁷ Fabrication of evidence constitutes a violation of the right to a fair trial under the Due Process clauses of the Fifth, Sixth, Fourteenth Amendments.⁸ The Due Process Clause of the 14th Amendment also forbids fundamental unfairness in the use of evidence, whether true or false.⁹

Suppression by the prosecution of evidence favorable to the accused, despite a request therefor, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.¹⁰ A former prisoner adequately pleaded a § 1983 claim that city police officers deprived him of due process by withholding exculpatory evidence from a prosecutor; the former prisoner alleged that the officers knowingly and intentionally switched test-fired bullets with bullets recovered from a murder victim's body and presented such bullets to the prosecutor under the pretense that they were recovered from the victim's body, then vouched for the same evidence at trial.¹¹ However, the alleged concealment of evidence by police officers in a prior criminal prosecution did not violate an arrestee's due process rights, for purposes of a subsequent 42 U.S.C.A. § 1983 claim brought after his convictions were reversed, where the allegedly suppressed evidence, including the time at which the police officers actually ran a records check during the initial traffic stop, was not material to the extortion, racketeering, and weapons charges and was either readily available to the arrestee before his criminal trial or was the type of evidence that the arrestee could have testified to at trial.¹²

Properly admitted hearsay evidence does not violate due process.¹³ The Due Process Clause does not place a per se prohibition on the use of hearsay evidence; that the focus on the reliability of hearsay evidence may not accommodate a simple, predictable, bright-line rule does not alter the fact that reliability, not cross-examination, is the due process touchstone.¹⁴ Unlike the Confrontation Clause, the Due Process Clause demands that evidence be reliable in substance, not that its reliability be evaluated in a particular manner.¹⁵

The Board of Immigration Appeals violated the due process rights of an alien seeking political asylum when it rejected her claims of past persecution based almost entirely upon hearsay statements of a State Department official in a letter that the alien received only days prior to the final hearing on her asylum application; the letter, which concerned the results of an "investigation" allegedly conducted by unknown individual into documents that the alien had submitted in support of her application, was in

the nature of multiple hearsay authored by a government official with no personal knowledge of the matters reported, of the alleged investigator, or of how the alleged investigation was conducted.¹⁶

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Footnotes

- 1 [Yarbrough v. Decatur Housing Authority](#), 941 F.3d 1022 (11th Cir. 2019).
- 2 [Brock v. Roadway Exp., Inc.](#), 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987); [de la Llana-Castellon v. I.N.S.](#), 16 F.3d 1093 (10th Cir. 1994).
- 3 [Application of Eisenberg](#), 654 F.2d 1107, 32 Fed. R. Serv. 2d 660, 60 A.L.R. Fed. 915 (5th Cir. 1981); [Collins v. Superior Court In and For Los Angeles County](#), 150 Cal. App. 2d 354, 310 P.2d 103 (2d Dist. 1957).
- 4 [Application of Eisenberg](#), 654 F.2d 1107, 32 Fed. R. Serv. 2d 660, 60 A.L.R. Fed. 915 (5th Cir. 1981); [U.S. v. Isa](#), 923 F.2d 1300 (8th Cir. 1991).
- 5 [Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n](#), 58 Ark. App. 145, 946 S.W.2d 730 (1997).
- 6 [People v. Rundle](#), 43 Cal. 4th 76, 74 Cal. Rptr. 3d 454, 180 P.3d 224 (2008), as modified, (May 14, 2008) and (disapproved of on other grounds by, [People v. Doolin](#), 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).
- 7 [Ramirez v. County of Los Angeles](#), 397 F. Supp. 2d 1208 (C.D. Cal. 2005).
- 8 [Hincapie v. City of New York](#), 2020 WL 362705 (S.D. N.Y. 2020).
- 9 [Blackburn v. State of Ala.](#), 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).
- 10 [Bell v. True](#), 413 F. Supp. 2d 657 (W.D. Va. 2006), *aff'd*, 260 Fed. Appx. 599 (4th Cir. 2008).
- 11 [Ricks v. Pauch](#), 322 F. Supp. 3d 813 (E.D. Mich. 2018).
- 12 [Ienco v. Angarone](#), 429 F.3d 680 (7th Cir. 2005).
- 13 [Commonwealth v. Imbert](#), 479 Mass. 575, 97 N.E.3d 335 (2018).
- 14 [Costa v. Fall River Housing Authority](#), 453 Mass. 614, 903 N.E.2d 1098 (2009).
Right to cross-examine witnesses, generally, see § 1005.
- 15 [Costa v. Fall River Housing Authority](#), 453 Mass. 614, 903 N.E.2d 1098 (2009).
- 16 [Ezeagwuna v. Ashcroft](#), 325 F.3d 396 (3d Cir. 2003).

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16B Am. Jur. 2d Constitutional Law § 1004

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1004. Right to introduce evidence under due process requirements, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3879, 3882, 3883

The right to present evidence is essential to the fair hearing required by the Due Process Clause.¹ In order to satisfy due process considerations, parties must be given a meaningful opportunity to present evidence.² That is, the due process right to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence³ and have judicial findings based upon it.⁴ However, it is not the duty of the court to inform litigants of the evidence they need to submit in order to support their motions.⁵

The opportunity to be heard, as is required by due process, includes the right to offer the testimony of witnesses;⁶ the failure to give a party the chance to present witnesses or testify violates this fundamental right.⁷ The right to call witnesses is one of the most important due process rights of a party, and accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done, especially when the witness sought to be excluded is a party's only witness or one of the party's most important witnesses, because if the witness is stricken, that party will be left unable to present evidence to support its theory of the case.⁸

Where a trial court acts within its discretion to exclude evidence, there is no due process violation.⁹ Also, not every erroneous exclusion of evidence gives rise to a due process violation.¹⁰ The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.¹¹ To comport with the requirements of due process, evidence must be probative and its admission fundamentally fair.¹² Procedural fairness under due process principles does not require the

admission of evidence which is only marginally relevant or which poses an undue risk of harassment, prejudice, or confusion of the issues.¹³ Additionally, due process requires that evidence be reliable, and some evidence may be so unreliable that its admission violates due process.¹⁴ The aim of the requirement of due process is not to exclude presumptively false or unreliable evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.¹⁵

Observation:

When evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense; an accused's constitutional right to present a defense is not an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence.¹⁶

The due process right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.¹⁷ Where governmental action seriously injures an individual, and where the reasonableness of the action depends on fact findings, due process requires that the evidence used to prove the Government's case be disclosed to the individual so that he has an opportunity to show that it is untrue.¹⁸ There is no hearing, in the constitutional sense, where the party does not know what evidence is being offered or considered and is not given an opportunity to test, explain, or refute such evidence.¹⁹ Blindsiding a party by announcing on the day of the hearing that the court will entertain evidence at a hearing not noticed as an evidentiary hearing is the epitome of a due process violation.²⁰

Generally, the right of due process gives a petitioner the opportunity to make an oral presentation to the court.²¹ However, the reception of oral evidence is not a requirement of due process; if all facts and suggestions deemed necessary are presented by affidavits and in writing, the exclusion of oral evidence is not a violation of the guarantee of due process.²² A state junior college was not denied due process when the president of the State Higher Education Services Corporation adopted, without any evidentiary hearing, the findings of the comptroller that some college students had not met the school's entrance requirements, thereby necessitating disallowance of a portion of the college's current tuition assistance, where the college had an opportunity to and did submit numerous written responses to the findings.²³

A party is entitled to know the issues on which an administrative decision will turn and to be apprised of the factual material on which an administrative agency relies for its decision so that he or she may rebut it, and the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation; however, these salutary principles do not preclude a fact finder from observing strengths and weaknesses in the evidence that no party identified.²⁴

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Footnotes

- 1 [Jenkins v. McKeithen](#), 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).
- 2 [Aspic Engineering and Construction Company v. ECC Centcom Constructors, LLC](#), 268 F. Supp. 3d 1053 (N.D. Cal. 2017), *aff'd*, 913 F.3d 1162 (9th Cir. 2019) (adequate opportunity); [Moore v. Griffin](#), 256 So. 3d 1201 (Ala. Civ. App. 2018) (one opportunity); [Gaspar's Passage, LLC v. RaceTrac Petroleum, Inc.](#), 243 So.

3d 492 (Fla. 2d DCA 2018); *In re Guardianship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015); *State v. Hegbloom*, 2014 UT App 213, 362 P.3d 921 (Utah Ct. App. 2014).

Within the context of a due-process challenge, a court abuses its discretion only when the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues. *Riddle v. Riddle*, 2018 ND 62, 907 N.W.2d 769 (N.D. 2018).

Jennings v. Mahoney, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971); *In re Robert S.*, 2009 ME 18, 966 A.2d 894 (Me. 2009); *Butler v. State*, 217 Miss. 40, 63 So. 2d 779 (1953); *In re International Workers Order*, 280 A.D. 517, 113 N.Y.S.2d 755 (1st Dep't 1952), order aff'd, 305 N.Y. 258, 112 N.E.2d 280 (1953). Due process requires nothing more than giving the appellant a hearing to present all relevant evidence. *Keeton by and Through Gray v. Ocean Springs School Board*, 281 So. 3d 889, 371 Ed. Law Rep. 1238 (Miss. Ct. App. 2019).

The right of a litigant to in-court presentation of evidence is a fundamental component of due process. *Interest of S.L.*, 2019 PA Super 10, 202 A.3d 723 (2019).

Baltimore & O.R. Co. v. U.S., 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936); *Butler v. State*, 217 Miss. 40, 63 So. 2d 779 (1953).

In re Guardianship of Barnhart, 290 Neb. 314, 859 N.W.2d 856 (2015).

Estate of Derzon, 2018 WI App 10, 380 Wis. 2d 108, 908 N.W.2d 471 (Ct. App. 2018).

Integral to the state constitutional rights of due process and unfettered access to the courts is the ability to present witnesses and other lawful evidence. *Thomas v. Johnson*, 329 Ga. App. 601, 765 S.E.2d 748 (2014).

E-Commerce Coffee Club v. Miga Holdings, Inc., 222 So. 3d 9 (Fla. 4th DCA 2017).

Gaspar's Passage, LLC v. RaceTrac Petroleum, Inc., 243 So. 3d 492 (Fla. 2d DCA 2018).

State v. Bergquist, 2019 VT 17, 211 A.3d 946 (Vt. 2019).

Virginia Board of Medicine v. Zackrisson, 67 Va. App. 461, 796 S.E.2d 866 (2017).

In re J.S., 10 Cal. App. 5th 1071, 217 Cal. Rptr. 3d 91 (4th Dist. 2017).

Godfrey v. Lynch, 811 F.3d 1013 (8th Cir. 2016).

People v. Lewis, 2017 IL App (1st) 150070, 414 Ill. Dec. 879, 81 N.E.3d 145 (App. Ct. 1st Dist. 2017).

More v. State, 880 N.W.2d 487 (Iowa 2016).

State v. Oldson, 293 Neb. 718, 884 N.W.2d 10 (2016).

State v. Muckerheide, 2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930 (2007).

Froehlich v. Ohio State Med. Bd., 2016-Ohio-1035, 61 N.E.3d 568 (Ohio Ct. App. 10th Dist. Franklin County 2016).

J.E.C.M. by and Through His Next Friend Saravia v. Lloyd, 352 F. Supp. 3d 559 (E.D. Va. 2018).

Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Douglas County v. State Bd. of Equalization and Assessment*, 158 Neb. 325, 63 N.W.2d 449 (1954); *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421 (1954); *State in Interest of Pilling v. Lance*, 23 Utah 2d 407, 464 P.2d 395 (1970).

Williams v. Sapp, 255 So. 3d 912 (Fla. 1st DCA 2018).

Notice, generally, see §§ 973 to 986.

Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).

Appeal of Lush, 16 Misc. 2d 137, 185 N.Y.S.2d 195 (Sup 1957), order aff'd, 8 A.D.2d 644, 8 A.D.2d 678, 185 N.Y.S.2d 202 (3d Dep't 1959).

Interboro Institute, Inc. v. Foley, 985 F.2d 90, 80 Ed. Law Rep. 792 (2d Cir. 1993).

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974).

16B Am. Jur. 2d Constitutional Law § 1005

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1005. Right to confront and cross-examine witnesses under due process requirements

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West's Key Number Digest

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[Condition interfering with accused's view of witness as violation of right of confrontation, 19 A.L.R.4th 1286](#)

[Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742](#)

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.¹ In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.² Additionally, due process depends on, in part, whether the notice was sufficient to provide the party a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence.³ The denial of the opportunity to cross-examine that witness works as a substantial deprivation upon a petitioner's right to a fair hearing.⁴

The Sixth Amendment right of confrontation is made applicable to the states through the 14th Amendment.⁵ However, confrontation and cross-examination are not rights universally applicable to all proceedings.⁶ Not every situation requires a formal hearing accompanied by the full rights of confrontation and cross-examination to comport with procedural due process

requirements;⁷ in some circumstances the absence of an opportunity for cross-examination is consistent with due process.⁸ The Sixth Amendment right to confront witnesses and its state equivalent do not apply to civil cases.⁹

Practice Tip:

To maintain a due process claim based on inability to cross-examine a witness, the party must demonstrate that there is a reasonable likelihood that the outcome might have been different.¹⁰

The compulsory attendance of witnesses, both in a criminal and civil trial, is also a vital part of the American concept of due process and a fair hearing.¹¹ The government's recognition of its interest in having persons appear in court by paying them for their participation in judicial proceedings does not require, under the Due Process Clause of the Fifth Amendment, that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary; that the government pays for one stage does not require that it pay in like manner for all stages.¹²

Observation:

The opportunity to be heard at an evidentiary hearing, as required by due process, requires time to secure the attendance of witnesses.¹³

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Footnotes

- 1 [Wolff v. McDonnell](#), 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); [Jenkins v. McKeithen](#), 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969); [Ring v. Erickson](#), 983 F.2d 818, 38 Fed. R. Evid. Serv. 493 (8th Cir. 1992) (child abuse hearing); [In re DeLeon J.](#), 290 Conn. 371, 963 A.2d 53 (2009).
Due process protections encompass procedural safeguards including the right to cross-examine adverse witnesses. [In re Adoption of Child ex rel. M.E.B.](#), 444 N.J. Super. 83, 130 A.3d 1262 (App. Div. 2016).
Effective cross-examination is integral to due process. [Farah v. Hertz Transporting, Inc.](#), 196 Wash. App. 171, 383 P.3d 552 (Div. 1 2016).
Where a person's liberty is at stake, the opportunity to confront witnesses and reveal problems with their testimony is an important component of due process. [U.S. v. Jordan](#), 742 F.3d 276 (7th Cir. 2014).
- 2 [Goldberg v. Kelly](#), 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); [Ching v. Mayorkas](#), 725 F.3d 1149 (9th Cir. 2013); [Doe v. University of Mississippi](#), 361 F. Supp. 3d 597, 364 Ed. Law Rep. 139 (S.D. Miss. 2019); [Floyd v. Board of Ada County Commissioners](#), 164 Idaho 659, 434 P.3d 1265 (2019); Eric H.

v. Ashley H., 302 Neb. 786, 925 N.W.2d 81 (2019); Jensen v. New York City Department of Finance, 60 Misc. 3d 513, 75 N.Y.S.3d 876 (Sup 2018); Interest of S.L., 2019 PA Super 10, 202 A.3d 723 (2019); Arnell v. Arnell, 416 S.W.3d 188 (Tex. App. Dallas 2013).

Prokop v. Lower Loup Natural Resources District, 302 Neb. 10, 921 N.W.2d 375 (2019).

Notice, generally, see §§ 973 to 986.

In re Brown, 54 Misc. 3d 515, 43 N.Y.S.3d 701 (N.Y. City Civ. Ct. 2016).

Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009).

Brock v. Roadway Exp., Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987); Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018).

Dubois v. Department of Agriculture, Conservation and Forestry, 2018 ME 68, 185 A.3d 743 (Me. 2018).

In re Estate of Clinger, 292 Neb. 237, 872 N.W.2d 37 (2015).

Hopkins v. Wollaber, 2019-NMCA-024, 458 P.3d 583 (N.M. Ct. App. 2018).

People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959); Drogaris v. Martine's Inc., 118 So. 2d 95 (Fla. 1st DCA 1960).

Hurtado v. U.S., 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973).

Williams v. Sapp, 255 So. 3d 912 (Fla. 1st DCA 2018).

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16B Am. Jur. 2d Constitutional Law § 1006

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1006. Limits on evidence; rules of evidence; impingement upon due process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3882

The Due Process Clause places some limits on evidence that may be introduced at trial.¹ The legislature of a state has the power to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements or deprive any person of one's constitutional rights.² For example, a state criminal statute permitting admission of prior sexual offenses as evidence of a defendant's propensity to commit the charged sexual offense does not violate due process.³ However, a state rule of evidence, which is designed to ensure trustworthy evidence, may be invalidated on constitutional grounds if it interferes with the ability of a defendant to offer testimony.⁴

In an administrative or quasi-judicial proceeding, due process requires only an informal hearing, not strict adherence to the rules of evidence.⁵

Under federal statute, the Supreme Court has the power to prescribe general rules of practice and procedure⁶ including authority over the promulgation of evidentiary rules.⁷ Under a federal statute pertaining to rules of courts, the United States Supreme Court has the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof).⁸ However, rules of practice and procedure may not abridge, enlarge or modify any substantive right.⁹

Footnotes

- 1 Toldness v. Ryan, 251 F. Supp. 3d 344 (D. Mass. 2017).
- 2 Am. Jur. 2d, Evidence § 6.
- 3 Unway v. Castro, 2002 WL 31867795 (N.D. Cal. 2002).
- 4 Am. Jur. 2d, Evidence § 6.
- 5 Bulloch County Bd. of Com'rs v. Williams, 332 Ga. App. 815, 773 S.E.2d 37 (2015).
- 6 Am. Jur. 2d, Federal Courts § 291.
- 7 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976) (discussing the black lung benefit provisions of the Coal Mine Health and Safety Act).
- 8 28 U.S.C.A. § 2072(a).
- 9 28 U.S.C.A. § 2072(b).

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16B Am. Jur. 2d Constitutional Law § 1007

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1007. Presumptions and burden of proof under due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Constitutional Law](#)  3883, 3884

No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law.¹ The presumption of innocence, although not articulated in the United States Constitution, is a basic component of a fair trial under our system of criminal justice.²

Presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as the lack of precise equivalence does not exceed the bounds substantially tolerated by the applicable level of scrutiny; that such provisions may thus reflect a "secondary" purpose of Congress is of no moment.³

The due process clause of the federal Constitution requires a relationship between a permissively inferred fact and the proven fact on which it depends.⁴ A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.⁵ Specifically, an inference does not violate due process under three conditions: (1) there is a rational connection between the basic fact and the presumed fact; (2) the presumed fact more likely than not flows from the basic fact; and (3) the inference is supported by corroborating evidence of guilt.⁶

The question how to allocate burdens in the context of a given procedure is one of procedural due process.⁷ It is normally within the power of a state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion; its decision in this regard is not subject to proscription under the Due Process Clause of the 14th

Amendment unless it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.⁸ In assessing whether a particular allocation of burdens comports with the Due Process Clause, Court of Appeals looks to a three-factor balancing test, and weighs: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; and (3) the government's interest.⁹

The function of a standard of proof, as a due process requirement, is to instruct the factfinder concerning the degree of confidence he should have in the correctness of factual conclusions for a particular type of adjudication¹⁰ and a standard of proof allocates the risk of error between the litigants and indicates the relative importance attached to the ultimate decision.¹¹ In any given proceeding, a minimum standard of proof tolerated by due process requirement reflects not only the weight of private and public interests affected, but also a societal judgment about how the risk of error should be distributed between litigants.¹² Consequently, the more important the decision, the higher the burden of proof.¹³ State statutes that unfairly shift the burden of proof will be struck down.¹⁴ Thus, placing the burden of proof on the individual whose liberty interests are at risk is inconsistent with due process requirements.¹⁵

Practice Tip:

Where no standard of proof is provided in a statute, due process requires that the court apply a standard which is appropriate to the issues involved.¹⁶

The due process guarantees of the 14th Amendment require a "clear and convincing" standard of proof in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital, and a mere "preponderance of the evidence" standard is not sufficient.¹⁷ However, in cases of involuntary civil commitment, due process does not require the state to prove its case beyond a reasonable doubt, and the state may confine a mentally ill person if it shows by clear and convincing evidence that the individual is mentally ill and dangerous.¹⁸

Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.¹⁹ On the other hand, the Due Process Clause of the 14th Amendment does not require that decisions to remove hydration and nutrition from incapacitated person be supported by clear and convincing evidence that the incapacitated person would have made the same decision.²⁰

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Footnotes

- 1 [Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 \(1973\).](#)
- 2 [Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 \(1976\).](#)
- 3 [Mathews v. Lucas, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 \(1976\).](#)
- 4 [People v. Jimenez, 246 Cal. App. 4th 726, 201 Cal. Rptr. 3d 76 \(3d Dist. 2016\).](#)

- 5 State v. Peraza, 239 Ariz. 140, 366 P.3d 1030 (Ct. App. Div. 2 2016); People v. Gomez, 6 Cal. 5th 243, 240 Cal. Rptr. 3d 315, 430 P.3d 791 (Cal. 2018), cert. denied, 140 S. Ct. 120, 205 L. Ed. 2d 106 (2019).
- 6 People v. Casciaro, 2015 IL App (2d) 131291, 400 Ill. Dec. 891, 49 N.E.3d 39 (App. Ct. 2d Dist. 2015).
An inference is arbitrary, and thus violates Due Process, unless there is substantial assurance that the inferred conclusion is more likely than not to flow from the proved fact on which it is made to depend. State v. James, 315 S.W.3d 440 (Tenn. 2010).
- 7 Ferrari v. County of Suffolk, 845 F.3d 46 (2d Cir. 2016), as amended, (Jan. 4, 2017).
Principles of due process control what process is required, including the proper standard of proof. Prostov v. State, Dept. of Licensing, 186 Wash. App. 795, 349 P.3d 874 (Div. 1 2015).
- 8 Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); Carr v. State, 196 So. 3d 926 (Miss. 2016).
- 9 Ferrari v. County of Suffolk, 845 F.3d 46 (2d Cir. 2016), as amended, (Jan. 4, 2017); People v. Mary H., 5 Cal. App. 5th 246, 210 Cal. Rptr. 3d 31 (5th Dist. 2016).
- 10 Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019); Marentette v. City of Canandaigua, 351 F. Supp. 3d 410 (W.D. N.Y. 2019), appeal dismissed, 2020 WL 556382 (2d Cir. 2020); People v. Mary H., 5 Cal. App. 5th 246, 210 Cal. Rptr. 3d 31 (5th Dist. 2016); In re Doe, 319 Ga. App. 574, 737 S.E.2d 581 (2013); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019); In re Interest of Christopher T., 281 Neb. 1008, 801 N.W.2d 243 (2011); In re Marriage of Wehr, 165 Wash. App. 610, 267 P.3d 1045 (Div. 2 2011).
- 11 Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); People v. Mary H., 5 Cal. App. 5th 246, 210 Cal. Rptr. 3d 31 (5th Dist. 2016).
- 12 Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019); L.A. v. Hoffman, 144 F. Supp. 3d 649 (D.N.J. 2015); Marentette v. City of Canandaigua, 351 F. Supp. 3d 410 (W.D. N.Y. 2019), appeal dismissed, 2020 WL 556382 (2d Cir. 2020); In re Angel R., 157 Conn. App. 826, 118 A.3d 117 (2015); In re Doe, 319 Ga. App. 574, 737 S.E.2d 581 (2013).
- 13 Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019).
- 14 First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545, 78 S. Ct. 1350, 2 L. Ed. 2d 1484 (1958); Schrum v. Bolding, 260 Ark. 114, 539 S.W.2d 415 (1976).
- 15 Smith v. State, 146 Idaho 822, 203 P.3d 1221 (2009).
- 16 In re Angel R., 157 Conn. App. 826, 118 A.3d 117 (2015).
- 17 Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).
- 18 Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re Detention of Samuelson, 189 Ill. 2d 548, 244 Ill. Dec. 929, 727 N.E.2d 228 (2000).
- 19 Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).
- 20 Schiavo ex rel Schindler v. Schiavo, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), aff'd, 403 F.3d 1289 (11th Cir. 2005).

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16B Am. Jur. 2d Constitutional Law § 1008

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1008. Presumptions and burden of proof under due process requirements—Creation of statutory presumptions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3883, 3890, 3895

In order that a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, it is only essential that there be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another not be so unreasonable as to be a purely arbitrary mandate;¹ the connection must assure a reasonably high degree of probability that the presumed fact follows from those proved directly.² Statutes creating permanent irrebuttable presumptions do not per se violate due process.³ A statutory presumption need not be accurate in every imaginable case, for purposes of constitutionality in terms of due process.⁴

The validity, for purposes of due process, of inferences, and presumptions, varies from case to case, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently.⁵ Since the process of determining the rationality of the connection between a fact proved and an ultimate fact presumed is, by its nature, highly empirical, significant weight should be accorded the legislative capacity to cull conclusions from actual experience in matters not within specialized judicial competence or completely commonplace.⁶

Practice Tip:

The substantive component of due process guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance.⁷ Like equal protection claims, substantive due process claims are subject to rational basis review, so long as they do not infringe fundamental rights and are not discriminatory.⁸ Where a statute neither interferes with a fundamental right nor singles out a suspect classification, a court will invalidate that statute on substantive due process grounds only when a party can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose.⁹

In assessing the constitutionality of evidentiary presumptions for purposes of due process, legislative judgments, such as ones in which the drafters of an analogous presumption explained the basis for that presumption, deserve respect.¹⁰ However, conclusive presumptions may violate due process.¹¹

A state's interest in administrative ease and certainty cannot, in and of itself, save a conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised.¹²

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Footnotes

- 1 County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976); Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 81 A.D.3d 183, 913 N.Y.S.2d 129 (1st Dep't 2010), judgment aff'd, 20 N.Y.3d 586, 965 N.Y.S.2d 61, 987 N.E.2d 621 (2013).
- 2 Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 81 A.D.3d 183, 913 N.Y.S.2d 129 (1st Dep't 2010), judgment aff'd, 20 N.Y.3d 586, 965 N.Y.S.2d 61, 987 N.E.2d 621 (2013).
- 3 Dean v. McWherter, 70 F.3d 43, 1995 FED App. 0334P (6th Cir. 1995).
- 4 County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).
- 5 County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).
- 6 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).
- 7 Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009).
- 8 Leib v. Hillsborough County Public Transp. Com'n, 558 F.3d 1301 (11th Cir. 2009).
- 9 Molinari v. Bloomberg, 564 F.3d 587 (2d Cir. 2009).
- 10 County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).
- 11 Turner v. Department of Employment Sec. and Bd. of Review of Indus. Com'n of Utah, 423 U.S. 44, 96 S. Ct. 249, 46 L. Ed. 2d 181 (1975) (involving the presumption that pregnant women are incapable of working after the sixth month of pregnancy); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974) (holding that a presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing her job violates due process); U. S. Dept. of Agriculture v. Murry, 413 U.S. 508, 93 S. Ct. 2832, 37 L. Ed. 2d 767 (1973) (involving the presumption regarding the

eligibility for food stamps); [Vlandis v. Kline](#), 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973) (involving the presumption that for the whole time that a student remains at a state university he is a nonresident, for the purpose of determining his liability for tuition and other fees).

12

[Vlandis v. Kline](#), 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973); [Stanley v. Illinois](#), 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

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16B Am. Jur. 2d Constitutional Law § 1009

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XIV. Due Process of Law

D. Hearing

4. The Tribunal

a. In General

§ 1009. Character of tribunal; minimal requirements for satisfying due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3887, 4027

The Due Process Clause does not force the conclusion that one has a constitutional right to a hearing before a tribunal of one's own choosing.¹ However, it does require a fair hearing before an impartial court or other tribunal having jurisdiction of the cause.² A fair trial in a fair tribunal is a basic requirement of due process under the Federal Constitution, and a necessary component of a fair trial is an impartial judge.³

Observation:

Due process requires a neutral and detached judge,⁴ in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party.⁵

Due process does not entitle a person to a hearing before any particular board, tribunal, or court but is satisfied if he or she is given a fair hearing and reasonable notice before a board, tribunal, or court having jurisdiction of the proceedings and of the parties.⁶ The tribunal must be appointed by law and be governed by rules of law previously established.⁷ When the trial court's failure to comply with local rules implicates issues of due process, depriving a party of a reasonable opportunity to defend against the disposition of the case in favor of the other party, the trial court is bound to comply with its local rules.⁸

To comply with the Due Process Clause, all assertions of state court jurisdiction, including in rem and quasi in rem actions, must be evaluated according to the minimum contacts standards set forth in decisions regarding in personam actions; the presence in the state of property alone will not support the state's jurisdiction where the property is unrelated to the cause of action.⁹

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Footnotes

- 1 O'Neill v. City of Philadelphia, 32 F.3d 785 (3d Cir. 1994).
- 2 Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); Burton v. Walker, 231 So. 2d 20 (Fla. 2d DCA 1970); Watkins v. Dodson, 159 Neb. 745, 68 N.W.2d 508 (1955); State v. Edwards, 157 Ohio St. 175, 47 Ohio Op. 122, 105 N.E.2d 259 (1952); State ex rel. Adams v. Superior Court of State, Pierce County, 36 Wash. 2d 868, 220 P.2d 1081 (1950).
- 3 Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994); City of Manassa v. Ruff, 235 P.3d 1051 (Colo. 2010); Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Haw. 376, 363 P.3d 224 (2015).
- 4 Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); Brucker v. City of Doraville, 391 F. Supp. 3d 1207 (N.D. Ga. 2019); Segovia v. State, 543 S.W.3d 497 (Tex. App. Houston 14th Dist. 2018).
- 5 Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).
- 6 State Acting By and Through Dept. of Water Resources v. Natomas Co., 239 Cal. App. 2d 547, 49 Cal. Rptr. 64 (3d Dist. 1966).
As to the character and sufficiency of hearings, generally, see §§ 997 to 1001.
As to notice, generally, see §§ 973 to 986.
- 7 Oates v. New York Life Ins. Co., 144 Fla. 744, 198 So. 681 (1940) (overruled in part on other grounds by, Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965)).
- 8 Wilmington Savings Fund v. Lautzenheiser, 2019-Ohio-2389, 138 N.E.3d 673 (Ohio Ct. App. 5th Dist. Stark County 2019).
- 9 Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (holding that the Due Process Clause does not contemplate that a state may make a binding judgment against an individual or corporate defendant with which the state has no contacts, ties, or relations).

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XIV. Due Process of Law

D. Hearing

4. The Tribunal

a. In General

§ 1010. Necessity of judicial tribunal to satisfy due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Under ordinary circumstances, the constitutional guarantee as to due process implies a formal judicial proceeding.¹ In fact, judicial proceedings usually are an element of due process of law, but such proceedings are not an indispensable requisite in all cases.² The term "proceeding" means such an exercise of the powers of government as the settled maxims of the law permit and sanction, under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.³

In many matters, the tribunal requirement of due process may be met by an administrative board or commission.⁴ Due process mandates that an administrative hearing constitute a fair trial conducted in accordance with the fundamental principles of fair play and applicable procedural standards established by law.⁵

Observation:

A party appearing in an adjudication hearing before an agency or tribunal is entitled to due process protections similar to those given to litigants in a judicial proceeding.⁶

The imposition of a fee for administrative review is not, in itself, a violation of due process.⁷

Even when confinement is a possible penalty, the Due Process Clause of the 14th Amendment does not preclude a trial before a nonlawyer judge where a trial de novo before a lawyer judge is available.⁸ Fundamental fairness does not require that a municipal judge be an attorney, where a party is entitled to a de novo trial before an attorney judge.⁹

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Footnotes

- 1 [Staten Island Edison Corporation v. Maltbie](#), 296 N.Y. 374, 73 N.E.2d 705, 8 A.L.R.2d 825 (1947) (holding that where the constitutional rights of liberty or property are involved, due process entitles the ones whose rights are invaded to an independent judicial determination of the constitutional question in the courts).
- 2 [Best v. Humboldt Placer Min. Co.](#), 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963); [Anderson Nat. Bank v. Lueckett](#), 321 U.S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944); [City of Dayton v. Keys](#), 21 Ohio Misc. 105, 50 Ohio Op. 2d 29, 50 Ohio Op. 2d 228, 252 N.E.2d 655 (C.P. 1969).
- 3 [Precious Metals Associates, Inc. v. Commodity Futures Trading Commission](#), 620 F.2d 900 (1st Cir. 1980); [N.H. Lyons & Co. v. Corsi](#), 3 N.Y.2d 60, 163 N.Y.S.2d 677, 143 N.E.2d 392 (1957).
- 4 [Barsky v. Board of Regents of University](#), 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954) (subcommittee of Education Department's Medical Committee on grievances); [State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County](#), 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930) (board of park commissioners).
- 5 [Precious Metals Associates, Inc. v. Commodity Futures Trading Commission](#), 620 F.2d 900 (1st Cir. 1980).
- 6 [Prokop v. Lower Loup Natural Resources District](#), 302 Neb. 10, 921 N.W.2d 375 (2019).
- 7 [Creedy v. Kansas Department of Revenue](#), 310 Kan. 454, 447 P.3d 959 (2019).
- 8 [North v. Russell](#), 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976) (subjection of an accused charged with drunken driving and exposed to imprisonment to trial by a lay police court judge); [Shoemaker v. State](#), 375 A.2d 431 (Del. 1977); [State v. Boone](#), 218 Kan. 482, 543 P.2d 945 (1975); [State ex rel. Moats v. Janco](#), 154 W. Va. 887, 180 S.E.2d 74 (1971).
The fact that bills that confined prosecution of certain specified traffic offenses to a Justice of the Peace Court would permit adjudication of those offenses by judges who were not members of the state bar without a right of appeal to the Court of Common Pleas did not violate any due process right to a law-trained judge, where the potential penalties for specified offenses did not include incarceration and involved fines of less than \$100. [In re Request for an Opinion of Justices of Delaware Supreme Court Regarding House Bills Nos. 134 and 135 of 146th General Assembly](#), 37 A.3d 860 (Del. 2012).
- 9 [Tsiosdia v. Rainaldi](#), 1976-NMSC-011, 89 N.M. 70, 547 P.2d 553 (1976).

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16B Am. Jur. 2d Constitutional Law § 1011

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

4. The Tribunal

b. Requirements of Fairness and Impartiality

§ 1011. Requirements of fair and impartial tribunal, generally; disqualification and recusal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3880, 4027

Forms

Forms relating to bias, ill-will, or objections to qualifications of hearing officer, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

Due process requires that the tribunal be a fair¹ and impartial one.² Due process requires a fair hearing before a fair tribunal³ and a necessary component of a fair trial is an impartial judge.⁴ Decision maker bias can provide a basis for a procedural due process violation.⁵ Under the Due Process Clause, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.⁶ The unbiased judge or neutral fact finder has long been considered essential to due process;⁷ a biased decision maker is constitutionally unacceptable under the due process clause.⁸

Due process guarantees an absence of actual bias on the part of a judge.⁹ Actual bias by an administrator, as could violate due process, could be personal animosity, illegal prejudice, or a personal or financial stake in the outcome.¹⁰ Recusal is required by

due process when objectively speaking, the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable,¹¹ and in reviewing claims of actual bias, a court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.¹² Specifically, as stated by the Supreme Court, the Due Process Clause is implemented, in the area of judicial recusal, by objective standards which do not require proof of actual bias; in defining these standards, a court asks whether, under a realistic appraisal of psychological tendencies and human weakness, the interest in the question poses such a risk of actual bias or prejudgment that the practice must be forbidden if guarantee of due process is to be adequately implemented.¹³ When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, under the Due Process Clause, the failure to recuse cannot be deemed harmless.¹⁴

The basic requirements of due process are applicable in administrative hearings, as well as in trials to a judge.¹⁵ The due process requirement of a fair trial in a fair tribunal applies to administrative agencies which adjudicate, as well as to courts.¹⁶ To establish a due-process violation in the context of an administrative body revoking a license, the licensee must demonstrate actual bias on the part of the decision-maker.¹⁷

Practice Tip:

There is a presumption that administrators are honest and impartial and therefore capable of judging a particular controversy fairly on the basis of its own circumstances, as required by due process.¹⁸ A respondent who alleges a due process violation due to a biased tribunal must overcome a presumption of honesty and integrity in those serving as adjudicators.¹⁹ Specifically, the presumption that administrators are honest and impartial is a rebuttable one, but the burden of rebuttal is heavy indeed: the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable under the due process clause.²⁰

Due process concerns permit any litigant to remove a biased judge.²¹

A judge testifying as a witness violates due process rights by creating a constitutionally intolerable appearance of partiality.²²

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Footnotes

- 1 [Marshall v. Jerrico, Inc.](#), 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980); [Nebraska Press Ass'n v. Stuart](#), 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); [Withrow v. Larkin](#), 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); [Valley v. Rapides Parish School Bd.](#), 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997).
- 2 [Schweiker v. McClure](#), 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982); [Marshall v. Jerrico, Inc.](#), 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980); [Valley v. Rapides Parish School Bd.](#), 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997); [Clements v. Airport Authority of Washoe County](#), 69 F.3d 321 (9th Cir. 1995); [Matter of Dependency of A.E.T.H.](#), 9 Wash. App. 2d 502, 446 P.3d 667 (Div. 1 2019).

- 3 State v. Battle, 192 Conn. App. 128, 217 A.3d 637 (2019), certification granted in part, 333 Conn. 942, 219 A.3d 373 (2019); Serdula v. State, 344 Ga. App. 587, 812 S.E.2d 6 (2018); State v. Clinkscale, 122 Ohio St. 3d 351, 2009-Ohio-2746, 911 N.E.2d 862 (2009).
- 4 Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994); Johnson v. Mississippi, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); United States v. Williams, 949 F.3d 1056 (7th Cir. 2020); State v. Fuentes, 302 Neb. 919, 926 N.W.2d 63 (2019); Tetra Tech EC, Inc. v. Wisconsin Department of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 (2018).
An impartial decision maker is essential to procedural due process. Campbell v. Barr, 387 F. Supp. 3d 286 (W.D. N.Y. 2019).
Due process demands impartiality on the part of those who function in quasi-judicial capacities. Janel Shicor, SLP v. Board of Speech Language Pathology and Audiology, 291 Or. App. 369, 420 P.3d 638 (2018).
Whenever due process requires a hearing, the adjudicator must be impartial. California Dui Lawyers Association v. California Department of Motor Vehicles, 20 Cal. App. 5th 1247, 229 Cal. Rptr. 3d 787 (2d Dist. 2018).
- 5 Saucon Valley Manor, Inc. v. Miller, 392 F. Supp. 3d 554 (E.D. Pa. 2019).
- 6 Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
- 7 Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019).
- 8 Doe v. University of Mississippi, 361 F. Supp. 3d 597, 364 Ed. Law Rep. 139 (S.D. Miss. 2019); Tetra Tech EC, Inc. v. Wisconsin Department of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 (2018).
- 9 Hawsawi v. United States, 389 F. Supp. 3d 1001 (U.S.C.M.C.R. 2019); Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016); Johnson v. Morales, 946 F.3d 911 (6th Cir. 2020); Echavarria v. Filson, 896 F.3d 1118 (9th Cir. 2018), cert. denied, 139 S. Ct. 2613, 204 L. Ed. 2d 276 (2019); Isom v. State, 2018 Ark. 368, 563 S.W.3d 533 (2018), cert. denied, 140 S. Ct. 342, 205 L. Ed. 2d 373 (2019).
- 10 Patrick v. Success Academy Charter Schools, Inc., 354 F. Supp. 3d 185, 362 Ed. Law Rep. 928 (E.D. N.Y. 2018).
Pecuniary interest of adjudicator, generally, see § 1013.
- 11 Rippo v. Baker, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017); Jordan v. U.S. Department of Justice, 315 F. Supp. 3d 584, 100 Fed. R. Serv. 3d 1510 (D.D.C. 2018); Isom v. State, 2018 Ark. 368, 563 S.W.3d 533 (2018), cert. denied, 140 S. Ct. 342, 205 L. Ed. 2d 373 (2019); Cromer v. State, 348 Ga. App. 113, 820 S.E.2d 269 (2018), cert. denied, (Aug. 5, 2019).
- 12 Johnson v. Morales, 946 F.3d 911 (6th Cir. 2020).
- 13 Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009); Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019); Daurbigny v. Liberty Personal Insurance Company, 272 So. 3d 69 (La. Ct. App. 3d Cir. 2019).
- 14 Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
A defendant's due process rights are violated when circumstances give rise to an unacceptable risk of actual bias from a tribunal. Commonwealth v. Bernal, 2018 PA Super 339, 200 A.3d 995 (2018).
- 15 Schweiker v. McClure, 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982); Gibson v. Berryhill, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (stating that individuals exposed to administrative proceedings of a quasi-judicial nature have a right to be tried by an unbiased and impartial board); Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997).
- 16 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).
- 17 Janel Shicor, SLP v. Board of Speech Language Pathology and Audiology, 291 Or. App. 369, 420 P.3d 638 (2018).
- 18 Patrick v. Success Academy Charter Schools, Inc., 354 F. Supp. 3d 185, 362 Ed. Law Rep. 928 (E.D. N.Y. 2018).
- 19 In re McKenna, 110 A.3d 1126 (R.I. 2015).
- 20 Patrick v. Success Academy Charter Schools, Inc., 354 F. Supp. 3d 185, 362 Ed. Law Rep. 928 (E.D. N.Y. 2018).
- 21 McFadden v. State, 553 S.W.3d 289 (Mo. 2018).
- 22 In re Daugherty, 558 S.W.3d 272 (Tex. App. Dallas 2018).

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16B Am. Jur. 2d Constitutional Law § 1012

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XIV. Due Process of Law

D. Hearing

4. The Tribunal

b. Requirements of Fairness and Impartiality

§ 1012. Bias or appearance of bias as affected by due process requirements, generally

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Forms

Forms relating to bias, ill-will, or objections to qualifications of hearing officer, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

The Fourteenth Amendment's due process clause may sometimes demand recusal even when a judge has no actual bias.¹ Actual bias is not necessary to make out a common law due process claim on the part of an adjudicator; the appearance of partiality may be sufficient to support such a claim.² The law requires more than an impartial judge to comply with due process; it requires that the judge also appear to be impartial.³ Due process and the necessity of an appearance of fairness require that a judge disqualify from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned.⁴ However, under the appearance of fairness doctrine, a judicial proceeding is valid as being consistent with due process if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.⁵ A state statutory provision for the disqualification of interested, biased, or prejudiced judges, which requires an accused to show

special prejudice in his or her particular case, is an insufficient safeguard of an accused's constitutional right to a trial before a disinterested judicial officer.⁶

Cases in which the adjudicator has a pecuniary interest in the outcome or in which he or she has been the target of personal abuse or criticism from the party before him or her may be situations where the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable under due process of law.⁷

A combination of investigative and adjudicative functions does not, without more, constitute a due process violation.⁸ A state professional examining board stays within the accepted bounds of due process where, after the board conducts an investigation, it issues findings and conclusions asserting the commission of certain acts and ultimately concludes that there is probable cause to believe that a member of the profession has violated state statutes; furthermore, since the initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes, the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.⁹ However, while the combination of investigative and adjudicatory functions in an administrative agency does not, without more, constitute a due process violation, a court is not thereby precluded from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.¹⁰

Mere friction between a court and counsel does not constitute bias.¹¹ Numerous and continuous rulings against a party are not grounds for a finding of judicial bias in violation of due process clause.¹²

The Due Process Clause demarks only the outer boundaries of judicial disqualifications, and Congress and the states remain free to impose more rigorous standards for judicial disqualification than those mandated as a matter of due process.¹³ The statutory disqualification standard, for proceedings in which a judge's impartiality might reasonably be questioned, is more demanding than that required by the Due Process Clause.¹⁴

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Footnotes

- 1 [Rippo v. Baker](#), 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017).
- 2 [Wards Corner Beauty Academy v. National Accrediting Commission of Career Arts & Sciences](#), 922 F.3d 568, 365 Ed. Law Rep. 38 (4th Cir. 2019).
- 3 [Matter of Dependency of A.E.T.H.](#), 9 Wash. App. 2d 502, 446 P.3d 667 (Div. 1 2019).
- 4 [In re Marriage of Meredith](#), 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).
- 5 [Matter of Dependency of A.E.T.H.](#), 9 Wash. App. 2d 502, 446 P.3d 667 (Div. 1 2019).
Due process requires disqualification of an administrative adjudicator where circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the adjudicator's impartiality. [Matter of Conservation District Use Application HA-3568](#), 143 Haw. 379, 431 P.3d 752 (2018), as amended, (Nov. 5, 2018) and as amended, (Nov. 30, 2018).
- 6 [Ward v. Village of Monroeville, Ohio](#), 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).
- 7 [Withrow v. Larkin](#), 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).
As to pecuniary interests of adjudicators, generally, see § 1013.
- 8 [Simpson v. Office of Thrift Supervision](#), 29 F.3d 1418 (9th Cir. 1994); [Woodrow v. Wildlife Com'n](#), 206 P.3d 835 (Colo. App. 2009); [Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark](#), 459 N.J. Super. 458, 212 A.3d 454 (App. Div. 2019), certification granted, 240 N.J. 7, 218 A.3d 1164 (2019) (investigative, charging, and adjudicative functions).
- 9 [Withrow v. Larkin](#), 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).
- 10 [Withrow v. Larkin](#), 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

- 11 U.S. v. Jackson, 983 F.2d 757 (7th Cir. 1993).
- 12 Schmidt v. Superior Court, County of Ventura, 44 Cal. App. 5th 570, 257 Cal. Rptr. 3d 699 (2d Dist. 2020),
as modified on denial of reh'g, (Feb. 14, 2020).
- 13 Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016); Caperton v. A.T. Massey Coal Co.,
Inc., 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).
A due process standard for a claim of judicial bias sets an exceptionally stringent standard. Schmidt v.
Superior Court, County of Ventura, 44 Cal. App. 5th 570, 257 Cal. Rptr. 3d 699 (2d Dist. 2020), as modified
on denial of reh'g, (Feb. 14, 2020).
- 14 U.S. v. Harris, 566 F.3d 422 (5th Cir. 2009).

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16B Am. Jur. 2d Constitutional Law § 1013

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XIV. Due Process of Law

D. Hearing

4. The Tribunal

b. Requirements of Fairness and Impartiality

§ 1013. Interest of judicial officer as affected by due process requirements; pecuniary interest

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[Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision, 4 A.L.R.6th 263](#)

[Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants, 72 A.L.R.3d 375](#)

Trial Strategy

[Zoning: Proof of Bias or Conflict of Interest, 32 Am. Jur. Proof of Facts 3d 531](#)

Forms

Forms relating to bias, ill-will, or objections to qualifications of hearing officer, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average person as a judge, which might lead them not to hold the balance nice, clear, and true.¹ The floor established by the Due Process Clause requires a judge with no interest in the outcome of a particular case.² Impartiality is lacking where a member of the tribunal has a pecuniary interest in the outcome of the proceeding.³ Litigants have a due process right to a trial before a judge with no direct, personal, substantial pecuniary interest in the outcome⁴ and a clear showing of a direct, pecuniary interest automatically requires disqualification of a decision maker on due process grounds.⁵

The guarantee against deprivation of life, liberty, or property without due process of law, which is expressed in the 14th Amendment to the Constitution of the United States and in similar state constitutional provisions, requires disqualification of a judicial officer who is shown to have a pecuniary interest in the fines, forfeitures, or fees payable by litigants before him or her.⁶ For example, a state's statutory system for the issuance of search warrants by justices of the peace violates the due process protections afforded by the Fourth and 14th Amendments of the Federal Constitution, where the justice is not salaried and receives a fee when a search warrant is issued but not when it is denied; such a situation is one where a defendant is subjected to judicial action not by a neutral and detached magistrate but instead by a court officer who has a direct, personal, substantial, pecuniary interest in the decision of whether to issue or to deny a warrant, where the amount of the search warrant fee is not de minimis.⁷

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Footnotes

- 1 [Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California](#), 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); [Wards Corner Beauty Academy v. National Accrediting Commission of Career Arts & Sciences](#), 922 F.3d 568, 365 Ed. Law Rep. 38 (4th Cir. 2019); [Reichert v. State ex rel. McCulloch](#), 2012 MT 111, 365 Mont. 92, 278 P.3d 455 (2012).
If the circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official pursuant to the Due Process Clause. [In re Conditional Use Permit No. 13-08](#), 2014 SD 75, 855 N.W.2d 836 (S.D. 2014).
- 2 [Tala E. H. v. Syed I.](#), 183 Conn. App. 224, 192 A.3d 494 (2018), certification denied, 330 Conn. 959, 199 A.3d 19 (2019).
- 3 [Withrow v. Larkin](#), 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); [Ward v. Village of Monroeville, Ohio](#), 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).
Due process is violated when judges have financial interests in the cases over which they preside. [Brucker v. City of Doraville](#), 391 F. Supp. 3d 1207 (N.D. Ga. 2019).
- 4 [Platt v. Board of Commissioners on Grievances and Discipline of Ohio Supreme Court](#), 894 F.3d 235, 106 Fed. R. Evid. Serv. 929 (6th Cir. 2018).

Recusal of a judge, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist. *City of Yonkers v. Yonkers Fire Fighters, Local 628*, 175 A.D.3d 676, 109 N.Y.S.3d 84 (2d Dep't 2019), leave to appeal dismissed, 34 N.Y.3d 1035, 115 N.Y.S.3d 221, 138 N.E.3d 1103 (2019).

5 *Palmer v. St. George City Council*, 2018 UT App 94, 427 P.3d 423 (Utah Ct. App. 2018), cert. denied, 432 P.3d 1231 (Utah 2018).

6 *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); *Ward v. Village of Monroe*, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *State ex rel. Brockman v. Proctor*, 35 Ohio St. 2d 79, 64 Ohio Op. 2d 50, 298 N.E.2d 532 (1973); *State ex rel. Shrewsbury v. Poteet*, 157 W. Va. 540, 202 S.E.2d 628, 72 A.L.R.3d 368 (1974).

7 *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

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16B Am. Jur. 2d Constitutional Law § 1014

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XIV. Due Process of Law

D. Hearing

4. The Tribunal

b. Requirements of Fairness and Impartiality

§ 1014. Institutional bias of adjudicator as affected by due process requirements

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West's Key Number Digest, [Constitutional Law](#)  3880, 4027

Forms

Forms relating to bias, ill-will, or objections to qualifications of hearing officer, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

Due process may be offended where the decision maker, because of his or her institutional responsibilities, would have so strong a motive to rule in a way that would aid the institution.¹ However, institutional conflicts of interest with minimal effects do not implicate due process because they do not provide a legitimate incentive for officials to stray from neutrality; instead, the official motive must be strong—so strong that it reasonably warrants fear of partisan influence on the judgment.² To state a plausible due process claim for institutional bias in a judgment, plaintiffs must allege sufficient facts to establish two things: (1) that there is a conflict of interest and (2) that the conflict of interest is substantial.³

Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case, which requires the judge's disqualification.⁴

Due process entitles criminal defendant to a proceeding in which he may present his case with assurance that no member of the court is predisposed to find against him.⁵

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Footnotes

- 1 [Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley](#), 114 F.3d 840, 118 Ed. Law Rep. 603 (9th Cir. 1997).
- 2 [Brucker v. City of Doraville](#), 391 F. Supp. 3d 1207 (N.D. Ga. 2019).
- 3 [Brucker v. City of Doraville](#), 391 F. Supp. 3d 1207 (N.D. Ga. 2019).
- 4 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
- 5 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

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16B Am. Jur. 2d Constitutional Law § 1015

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XIV. Due Process of Law

D. Hearing

4. The Tribunal

b. Requirements of Fairness and Impartiality

§ 1015. Arbitrary action or action based on misinformation as protected against by due process requirements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3880

Due process of law protects against arbitrary action, but what is such arbitrary action depends upon the facts of the case.¹

Observation:

Surprise as to a decision and the grounds thereof does not necessarily indicate a want of due process.²

A defendant's due process rights are violated if a court relies on questionable information to justify increase in the accused's offense level, for sentencing purposes.³ The Due Process Clause of a state Constitution also protects a defendant from being sentenced based upon misinformation.⁴

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Footnotes

- 1 [Powell v. State of Ala.](#), 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).
- 2 [Market St. Ry. Co. v. Railroad Commission of State of Cal.](#), 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
- 3 [U.S. v. Zuniga-Chavez](#), 376 F. Supp. 2d 1163 (D.N.M. 2004), [aff'd](#), 464 F.3d 1199 (10th Cir. 2006).
- 4 [State v. Hass](#), 2011 MT 296, 363 Mont. 8, 265 P.3d 1221 (2011).

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16B Am. Jur. 2d Constitutional Law § 1016

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XIV. Due Process of Law

D. Hearing

5. Review of Determination

§ 1016. Review of determination under due process requirements, generally; rehearing or new trial

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3888, 4016

Forms

Forms relating to review of administrative order, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

The Federal Constitution requires due process of law, but it does not require an endless number of opportunities for one to assert or reassert his or her rights.¹ A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is generally all that can be adjudged vital under the guarantee of due process of law; one hearing before judgment, if ample, satisfies the demand of the Federal Constitution in this respect and therefor rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings.²

While the procedural rule allowing entry of a new judgment on a motion for rehearing does not specifically require a hearing on a motion for rehearing, due process requires a hearing on such a motion before a trial court can grant the motion and amend a final judgment.³ An easement claimant was not denied due process when the Court of Appeals denied his petition for a

rehearing prior to reviewing his reply to a property owner's return to the claimant's petition for a rehearing, where the claimant was afforded an opportunity to be heard and received judicial review of his reply.⁴

Practice Tip:

A motion for rehearing is not a sufficient, meaningful opportunity to be heard with regard to the underlying order that is the subject of the motion, as required to satisfy due process.⁵

Although the better practice would have been to allow witness testimony at a hearing upon remand, in an action between real estate investors to determine rights and interests to property and assets of their real estate investment venture, the defendant was not deprived of his opportunity to be heard, and therefore the trial court's denial of his request to present witnesses at a remand hearing did not deprive him of due process rights; although in a prior appeal, the Court of Appeals remanded the matter for enforcement of a mediated settlement agreement, the Court did not order the trial court to conduct further evidentiary proceedings.⁶ However, allowing a district court to modify findings or conclusions of a standing master not specifically objected to by either party would deny adequate notice and due process to the parties and lead to an absurd result.⁷

A state administrative review act that permitted state-court review of a final administrative ruling, provided that an adequate remedy for a village fire inspector's claim that he was deprived of due process at his posttermination hearing because the village board, which was allegedly biased against him, presided over the hearing, and, thus, the inspector's due process rights were not violated at the posttermination hearing; although the act precluded independent fact finding, it did not bar a review of factual findings on a claim of bias or prejudice, and the act also permitted remand for additional fact finding if necessary.⁸

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Footnotes

- 1 Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996).
- 2 Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964); Smith v. City and County of San Francisco, 11 Cal. App. 3d 606, 89 Cal. Rptr. 878 (1st Dist. 1970); Board of Higher Ed. in City of New York v. State Human Rights Appeal Bd., 53 A.D.2d 627, 384 N.Y.S.2d 204 (2d Dep't 1976). Rehearing, reconsideration, or modification of administrative determinations, generally, see Am. Jur. 2d, Administrative Law § 362.
- 3 Thomas v. Cromer, 276 So. 3d 69 (Fla. 3d DCA 2019).
- 4 Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015).
- 5 Richard v. Bank of America, N.A., 258 So. 3d 485 (Fla. 4th DCA 2018).
- 6 Elrod v. Bauman, 136 N.E.3d 232 (Ind. Ct. App. 2019).
- 7 Patton v. Patton, 2015 MT 7, 378 Mont. 22, 340 P.3d 1242 (2015).
- 8 Michalowicz v. Village of Bedford Park, 528 F.3d 530 (7th Cir. 2008).

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16B Am. Jur. 2d Constitutional Law § 1017

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XIV. Due Process of Law

D. Hearing

5. Review of Determination

§ 1017. Appeal or similar review sufficient to satisfy due process requirements

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3888, 4016

Forms

Forms relating to review of administrative order, see Am. Jur. Pleading and Practice Forms, Administrative Law [\[Westlaw®\(r\) Search Query\]](#)

If a full and fair trial or hearing on the merits is provided, the Due Process Clause of the 14th Amendment does not require a state to provide appellate review.¹ There is no federal due process right to appeal, even in criminal cases.² The Due Process Clause does not require the state to provide a criminal defendant with any significant level of appellate process at all.³ Due process alone does not require that a state give an indigent mother the right to appeal from a termination of her parental rights.⁴

The right to an appeal is not a constitutional one; it is but a statutory privilege available to one who strictly complies with the statutes and rules on which the privilege is granted.⁵ While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process.⁶ On the other hand, a state's denial of judicial review of the size of punitive damage awards, pursuant to a state constitutional provision which prohibits review of a fact tried by a jury

unless a court can affirmatively say that there is no evidence to support the verdict, violates the Due Process Clause of the 14th Amendment.⁷

Observation:

A jury's award of punitive damages is not a finding of fact but rather is expression of moral condemnation, and thus, de novo appellate review of a district court's determination that the award is consistent with due process does not impair the prevailing party's right to a jury trial.⁸

However, even an appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process.⁹ This rule pertains even in criminal cases.¹⁰

Dismissal of an appeal without a prior notice warning of imminent dismissal is a denial of due process.¹¹ Also, a court order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process.¹²

Mere delay in an appeal, without more, is not sufficient basis for finding a constitutional due process violation.¹³ However, an accused's due process right to a speedy posttrial review was violated by a delay of over seven years to review a 143-page guilty plea record, notwithstanding that the accused did not establish specific prejudice, as the delay was so egregious that tolerating it would have adversely affected the public's perception of the fairness and integrity of the military justice system.¹⁴

Practice Tip:

Even in the context of due process at the appellate level, a hearing need not include oral presentations.¹⁵

For purposes of procedural due process, neither a recording nor a transcript is mandatory in instances when a reviewing court can determine that due process was accorded and there was substantial evidence to support the agency decision.¹⁶ In a different situation, expedited procedures did not deny due process to death-row inmates in their appeal of the dismissal of their complaint for a declaratory judgment in their facial challenge, based on state and federal constitutional prohibitions on cruel and unusual punishment, to the state's lethal-injection protocol, despite the argument that the voluminous record precluded meaningful appellate review under the expedited procedures; the Supreme Court permitted inmates to exceed the 50-page limitation for the argument section of their brief by filing an argument section consisting of 174 pages, four other inmates filed a separate 49-page brief, and each side was permitted an additional 15 minutes for argument.¹⁷

Observation:

On a due process challenge to an administrative hearing, the Court of Appeal exercises its own judgment regarding whether the appellant received a fair administrative trial.¹⁸

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Footnotes

- 1 [Lindsey v. Normet](#), 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); [District of Columbia v. Clawans](#), 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937); [State v. Legg](#), 151 W. Va. 401, 151 S.E.2d 215 (1966).
- 2 [State, Department of Social and Health Services v. Fox](#), 192 Wash. App. 512, 371 P.3d 537 (Div. 1 2016), as amended on denial of reconsideration, (Mar. 24, 2016).
- 3 [Hart v. MCI Concord Superintendent](#), 36 F. Supp. 3d 186 (D. Mass. 2014).
- 4 [M.L.B. v. S.L.J.](#), 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996).
- 5 [Chanosky v. City Bldg. Supply Co.](#), 152 Conn. 449, 208 A.2d 337 (1965).
- 6 [National Union of Marine Cooks and Stewards v. Arnold](#), 348 U.S. 37, 75 S. Ct. 92, 99 L. Ed. 46 (1954).
- 7 [Honda Motor Co., Ltd. v. Oberg](#), 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994).
- 8 [Cooper Industries, Inc. v. Leatherman Tool Group, Inc.](#), 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).
- 9 [Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California](#), 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).
Right to fair tribunal, generally, see §§ 1011 to 1015.
Generally, an adjudication that is tainted by bias cannot be constitutionally redeemed by a review in an unbiased tribunal; thus, subsequent state court procedures, even if they include a de novo review, cannot "cure" bias in the initial adjudication. [Clements v. Airport Authority of Washoe County](#), 69 F.3d 321 (9th Cir. 1995).
- 10 [Estelle v. Dorrough](#), 420 U.S. 534, 95 S. Ct. 1173, 43 L. Ed. 2d 377 (1975); [Ross v. Moffitt](#), 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974); [Ortwein v. Schwab](#), 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973).
- 11 [Windhaven Insurance Company v. Biscayne Rehab Center, Inc.](#), 243 So. 3d 1034 (Fla. 3d DCA 2018).
The dismissal of an appeal from a decision of chancery court without an official notice of deficiencies in appeal by the circuit clerk deprives the appellant of due process. [Adams v. Mississippi State Oil & Gas Bd.](#), 80 So. 3d 869 (Miss. Ct. App. 2012).
- 12 [Barsis v. Barsis](#), 209 So. 3d 654 (Fla. 5th DCA 2017).
An appellate court will not affirm a trial court's judgment when due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment. [Austill v. Prescott](#), 2019 WL 3050439 (Ala. 2019).
- 13 [Douglas v. Hendricks](#), 236 F. Supp. 2d 412 (D.N.J. 2002), *aff'd*, 456 F.3d 403 (3d Cir. 2006).
- 14 [U.S. v. Bush](#), 67 M.J. 508 (N.M.C.C.A. 2008), decision *aff'd*, 68 M.J. 96 (C.A.A.F. 2009).
- 15 [Miller v. Mathias](#), 428 Md. 419, 52 A.3d 53 (2012).
- 16 [McDonell v. Harford County Housing Agency](#), 462 Md. 586, 202 A.3d 540 (2019).

- 17 [Abdur'Rahman v. Parker](#), 558 S.W.3d 606 (Tenn. 2018), cert. denied, 139 S. Ct. 11, 202 L. Ed. 2d 258 (2018) and cert. denied, 139 S. Ct. 626, 202 L. Ed. 2d 454 (2018) and cert. denied, 139 S. Ct. 1533, 204 L. Ed. 2d 245 (2019).
- 18 [JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist.](#), 30 Cal. App. 5th 945, 242 Cal. Rptr. 3d 197 (2d Dist. 2018).

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16B Am. Jur. 2d Constitutional Law XV A Refs.

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XV. Full Faith and Credit

A. In General

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Research References

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West's Key Number Digest, [States](#)  5(2)

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A.L.R. Index, Full Faith and Credit

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XV. Full Faith and Credit

A. In General

§ 1018. Constitutional provision for full faith and credit

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West's Key Number Digest

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The United States Constitution provides that Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State, and that the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.¹ The general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere.² A federal statute provides the mode in which the public acts, records, and judicial proceedings of the states are to be authenticated and further provides that such Acts, records and judicial proceedings or copies thereof, so authenticated, will have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of the State, Territory or Possession from which they are taken.³

The doctrine of comity is distinguished from full faith and credit, in that the latter is an explicit constitutionally based provision involving relationships only among the states, whereas comity is based, not on a constitutional provision, but on concepts such as harmony, accommodation, policy, and compatibility.⁴

Observation:

The purpose of the full faith and credit clause is to avoid conflicts between states in adjudicating the same matters.⁵ The Full Faith and Credit Clause alters the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and makes them integral parts of a single nation.⁶

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Footnotes

- 1 U.S. Const. Art. IV, § 1.
- 2 Bradshaw v. Bradshaw, 826 S.E.2d 779 (N.C. Ct. App. 2019).
- 3 28 U.S.C.A. § 1738.
Recognition and enforcement of foreign judgments under the Full Faith and Credit clause, generally, see Am. Jur. 2d, Executions and Enforcement of Judgments §§ 590 to 604.
Authentication of enactments of another state, generally, see Am. Jur. 2d, Evidence § 1294.
- 4 Hala v. Orange Regional Medical Center, 60 Misc. 3d 274, 76 N.Y.S.3d 369 (Sup 2018), aff'd, 178 A.D.3d 151, 113 N.Y.S.3d 212 (2d Dep't 2019), leave to appeal dismissed, 2020 WL 1521594 (N.Y. 2020).
- 5 Balboa Capital Corporation v. Plaza Auto Care, Inc., 178 A.D.3d 646, 114 N.Y.S.3d 91 (2d Dep't 2019).
- 6 V.L. v. E.L., 136 S. Ct. 1017, 194 L. Ed. 2d 92 (2016); In re Mary G., 151 Cal. App. 4th 184, 59 Cal. Rptr. 3d 703 (4th Dist. 2007); Nastro v. D'Onofrio, 76 Conn. App. 814, 822 A.2d 286 (2003); Ledoux-Nottingham v. Downs, 210 So. 3d 1217 (Fla. 2017); Estate of Black v. Black, 2019 IL App (1st) 181452, 433 Ill. Dec. 713, 133 N.E.3d 61 (App. Ct. 1st Dist. 2019); Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998, 2019 SD 35, 931 N.W.2d 244 (S.D. 2019).
The Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign states into a nation. Baker by Thomas v. General Motors Corp., 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

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XV. Full Faith and Credit

A. In General

§ 1019. Interpretation of Full Faith and Credit Clause

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  5(2)

The law favors expansive application of the Full Faith and Credit Clause in order to fulfill the clause's purpose of ensuring that all states within the federal system recognize each other's official acts, judicial actions, and judgments.¹

The constitutional requirement as to full faith and credit must be interpreted in connection with other provisions of the Constitution.² Thus, the Full Faith and Credit Clause of Article IV, § 1 should generally be construed and considered together with § 1 of the 14th Amendment.³

Observation:

The Full Faith and Credit Clause has been construed as not constituting a limitation upon the bankruptcy powers of Congress.⁴ However, a statute requiring that federal courts give full faith and credit to the acts, records, and judicial proceedings of any state, territory, or possession applies to bankruptcy courts, and absent fraud in the procurement of a default judgment, bankruptcy proceedings may not be used to relitigate issues already resolved in a court of competent jurisdiction.⁵

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Footnotes

- 1 [R.S. v. PacifiCare Life & Health Ins. Co.](#), 194 Cal. App. 4th 192, 128 Cal. Rptr. 3d 1 (2d Dist. 2011).
- 2 [Old Wayne Mut. Life Ass'n v. McDonough](#), 204 U.S. 8, 27 S. Ct. 236, 51 L. Ed. 345 (1907).
- 3 [Matera v. Hauptmann](#), 13 N.J. Misc. 483, 179 A. 626 (Sup. Ct. 1935); [In re Hanrahan's Will](#), 109 Vt. 108, 194 A. 471 (1937).
- 4 [U.S. Nat. Bank of Omaha v. Pamp](#), 83 F.2d 493 (C.C.A. 8th Cir. 1936).
The doctrine of full faith and credit did not deprive the bankruptcy court of jurisdiction to enter a money judgment in a nondischargeability adversary proceeding, even though the underlying debt had already been reduced to judgment in state court. [In re Sasson](#), 424 F.3d 864 (9th Cir. 2005).
- 5 [In re Keene Corp.](#), 162 B.R. 935 (Bankr. S.D. N.Y. 1994), referring to 28 U.S.C.A. § 1738.
The doctrine of full faith and credit precludes relitigation, in dischargeability proceedings, by the bankruptcy court of factual and legal issues actually decided in state court. [In re Sasson](#), 424 F.3d 864 (9th Cir. 2005).

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16B Am. Jur. 2d Constitutional Law § 1020

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XV. Full Faith and Credit

A. In General

§ 1020. Statutes and Constitutions as "public acts" for purposes of Full Faith and Credit Clause

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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A statute is a "public act" within the meaning of [U.S. Const. Art. IV, § 1](#) of the Federal Constitution.¹ If a court of one state refuses to enforce the statute of another state in a case in which it ought to do so and in which the statute gives a right, it thereby denies the full faith and credit demanded by the Federal Constitution because a statute is a public act of another state.² A statute which has the effect of refusing to permit actions against residents of the state by a nonresident to enforce a foreign statutory liability assessed under the statutes of another state violates the Full Faith and Credit Clause.³ Moreover, the Full Faith and Credit Clause is operative not merely with respect to the public acts of a sister state but also with respect to the "attributes" thereof.⁴ However, the Full Faith and Credit Clause does not require a greater effect to be given to a state statute in other states than is given to it by the courts of the enacting state.⁵

The duty imposed upon the courts to give full faith and credit to the constitution of a state as a public act of the state is as obligatory as is the similar duty with respect to the judicial proceedings of such a state.⁶

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Footnotes

- ¹ [Franchise Tax Bd. of California v. Hyatt](#), 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016); [Carroll v. Lanza](#), 349 U.S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1955); [Hughes v. Fetter](#), 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951); [Oregon State University v. Superior Court](#), 16 Cal. App. 5th 1180, 225 Cal. Rptr. 3d 31, 349 Ed. Law Rep. 149 (4th Dist. 2017), review denied, (Feb. 21, 2018).

- 2 First Nat. Bank of Chicago v. United Air Lines, 342 U.S. 396, 72 S. Ct. 421, 96 L. Ed. 441 (1952); Broderick v. Rosner, 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A.L.R. 696 (1932) (overruled in part on other grounds by, Crider v. Zurich Ins. Co., 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965)).
- 3 Broderick v. Rosner, 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); Broderick v. McGuire, 119 Conn. 83, 174 A. 314, 94 A.L.R. 890 (1934).
- 4 Hirson v. United Stores Corp., 263 A.D. 646, 34 N.Y.S.2d 122 (1st Dep't 1942), judgment aff'd, 289 N.Y. 564, 43 N.E.2d 712 (1942).

Under the Full Faith and Credit Clause, the District of Columbia must recognize the status of a foreign receiver, as established by foreign law, and accord that foreign receiver the same rights and privileges against judgment creditors seeking to levy against assets in the District of Columbia, that the District would accord the same kind of receiver if appointed locally in the District of Columbia. *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328 (D.C. 1994).
- 5 State of Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439, 53 S. Ct. 663, 77 L. Ed. 1307, 14 Ohio L. Abs. 368 (1933).
- 6 Smithsonian Institution v. St. John, 214 U.S. 19, 29 S. Ct. 601, 53 L. Ed. 892 (1909).

The Full Faith and Credit Clause requires the state to give full force and effect to the constitution of a sister state. *People v. Zuccaro*, 200 Misc. 41, 108 N.Y.S.2d 97 (Gen. Sess. 1951).

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16B Am. Jur. 2d Constitutional Law § 1021

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XV. Full Faith and Credit

A. In General

§ 1021. Statutes and Constitutions as "public acts" for purposes of Full Faith and Credit Clause—Application of provision to federal statutes

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West's Key Number Digest

West's Key Number Digest, [States](#)  5(2)

While the Full Faith and Credit Clause of the Constitution has been held not to apply to a federal statute,¹ so that a state is not required to enforce a federal statute, the Supremacy Clause of the Constitution has the effect of making such statutes enforceable.² Nevertheless, there is some authority to the effect that neither Congress nor the United States Supreme Court has power, under the Full Faith and Credit Clause, to take from a state forum the right to decide, according to its own standards, whether a federal statute is a penal law unenforceable within its jurisdiction, since Article IV, § 1 applies only to sister states.³

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Footnotes

- ¹ [Edmonds v. State](#), 201 Ga. 108, 39 S.E.2d 24 (1946).
- ² [McKnett v. St. Louis & S.F. Ry. Co.](#), 292 U.S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934) (a state may not discriminate against rights arising under federal laws).
- ³ [Miller v. Municipal Court of City of Los Angeles](#), 22 Cal. 2d 818, 142 P.2d 297 (1943).

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16B Am. Jur. 2d Constitutional Law § 1022

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XV. Full Faith and Credit

A. In General

§ 1022. Application of Full Faith and Credit Clause to particular public acts and statutes

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[Validity, Construction, and Application of Full Faith and Credit for Child Support Orders Act \(FFCCSOA\), 28 U.S.C.A. § 1738B—State Cases, 18 A.L.R.6th 97](#)

[Construction & effect of provision of Uniform Reciprocal Enforcement of Support Act that no support order shall supersede or nullify any other order, 31 A.L.R.4th 347](#)

[Choice of law as to exemption of property from execution, 100 A.L.R.3d 1235](#)

[Requirement of full faith and credit to foreign judgment for punitive damages, 44 A.L.R.3d 960](#)

[Res judicata or collateral estoppel effect, in state where real property is located, of foreign decree dealing with such property, 32 A.L.R.3d 1330](#)

As might be expected, the Full Faith and Credit Clause has been invoked (sometimes successfully and sometimes not) with respect to a wide variety of foreign statutes, including, among others, statutes pertaining to—

— adoption of children.¹

— alimony.²

- antitrust laws.³
- arbitration.⁴
- breach of warranty.⁵
- child custody and support.⁶
- contracts.⁷
- corporate liquidations.⁸
- creation and dissolution of corporations.⁹
- extradition.¹⁰
- evidence.¹¹
- fraud.¹²
- garnishment.¹³
- immigration.¹⁴
- insurance,¹⁵ including statutes authorizing direct actions against insurers¹⁶ and statutes relating to mutual fraternal benefit societies.¹⁷
- interest rates and usury.¹⁸
- legitimacy of offspring.¹⁹
- marijuana possession.²⁰
- marriage and divorce,²¹ including marriage subsequent to divorce.²²
- medical malpractice.²³
- notice of claim.²⁴
- pardons for crimes.²⁵
- personal injury actions.²⁶
- property.²⁷
- securities laws.²⁸
- sex offender registration.²⁹

— taxation.³⁰

— torts generally.³¹

— wills and probate.³²

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Footnotes

- 1 [In re Trust Created by Nixon](#), 277 Neb. 546, 763 N.W.2d 404 (2009).
Oklahoma statute preventing recognition of adoptions by same-sex couples was unconstitutional because the Full Faith and Credit Clause required Oklahoma to recognize adoptions, including same-sex couples' adoptions that were validly decreed in other states. [Finstuen v. Crutcher](#), 496 F.3d 1139 (10th Cir. 2007).
- 2 [Boucher v. C.I.R.](#), 710 F.2d 507 (9th Cir. 1983); [Krueger v. Krueger](#), 179 Conn. 488, 427 A.2d 400 (1980).
- 3 [American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.](#), 640 F. Supp. 1411 (E.D. N.C. 1986).
- 4 [Chicago SouthShore and South Bend R.R. v. Northern Indiana Commuter Transp. Dist.](#), 289 Ill. App. 3d 533, 224 Ill. Dec. 595, 682 N.E.2d 156 (1st Dist. 1997), rev'd on other grounds, 184 Ill. 2d 151, 234 Ill. Dec. 395, 703 N.E.2d 7 (1998).
- 5 [Price v. International Tel. and Tel. Corp.](#), 651 F. Supp. 706, 2 U.C.C. Rep. Serv. 2d 1552 (S.D. Miss. 1986); [Microsoft Corp. v. Manning](#), 914 S.W.2d 602, 29 U.C.C. Rep. Serv. 2d 162 (Tex. App. Texarkana 1995) (abrogated on other grounds by, [Citizens Ins. Co. of America v. Daccach](#), 217 S.W.3d 430 (Tex. 2007)).
- 6 [Matter of Proceeding for Support under Uniform Support of Dependents Law](#), 94 Misc. 2d 588, 405 N.Y.S.2d 225 (Fam. Ct. 1978); [Roundtree v. Bates](#), 1981 OK 77, 630 P.2d 1299 (Okla. 1981).
Ordinary principles of claim and issue preclusion do not apply to claims under the International Child Abduction Remedies Act (ICARA) and the Hague Convention on the Civil Aspects of International Child Abduction; rather, federal courts adjudicating Hague Convention petitions must accord full faith and credit only to the judgments of those state or federal courts that actually adjudicated a Hague Convention claim in accordance with the dictates of the Convention and ICARA. [Gaudin v. Remis](#), 415 F.3d 1028 (9th Cir. 2005).
- 7 [Klaxon Co. v. Stentor Electric Mfg. Co.](#), 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); [John Hancock Mut. Life Ins. Co. v. Yates](#), 299 U.S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936) (a state statute may be such an integral part of a contract that a sister state is compelled to sustain the contract under the Full Faith and Credit Clause); [Hoffman v. National Equipment Rental, Ltd.](#), 643 F.2d 987 (4th Cir. 1981); [Gantt v. Felipe Y. Carlos Hurtado & CIA](#), 297 N.Y. 433, 79 N.E.2d 815 (1948).
- 8 [Converse v. Hamilton](#), 224 U.S. 243, 32 S. Ct. 415, 56 L. Ed. 749 (1912).
Even though a second state must acknowledge the right of a statutory successor to sue in its courts, the second state, where assets of the insolvent corporation are located, can apply its own laws to determine who will take such assets. [Clark v. Williard](#), 294 U.S. 211, 55 S. Ct. 356, 79 L. Ed. 865, 98 A.L.R. 347 (1935).
- 9 [Hammonds v. Freymiller Trucking, Inc.](#), 115 N.M. 364, 1993-NMCA-030, 851 P.2d 486 (Ct. App. 1993).
- 10 [Hill v. Blake](#), 186 Conn. 404, 441 A.2d 841 (1982).
- 11 [John Hancock Mut. Life Ins. Co. v. Yates](#), 299 U.S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936) (holding that the Georgia courts had to give full faith and credit to a New York parol evidence statute which prevented recovery on an insurance contract made in New York).
- 12 [James-Dickinson Farm Mortgage Co. v. Harry](#), 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569 (1927).
- 13 [Struebin v. State of Ill.](#), 421 N.W.2d 874 (Iowa 1988).
- 14 [Yanez-Popp v. U.S. I.N.S.](#), 998 F.2d 231 (4th Cir. 1993) (the fact that the INS's test to determine a conviction's finality for immigration purposes did not construe a "conviction" as the Maryland courts do did not violate the Full Faith and Credit Clause since the Constitution grants Congress authority to establish a uniform rule of naturalization).
- 15 [State Farm Mut. Auto. Ins. Co. v. Duel](#), 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945); [Aetna Life Ins. Co. v. Dunken](#), 266 U.S. 389, 45 S. Ct. 129, 69 L. Ed. 342 (1924); [American Fire Ins. Co. v. King Lumber & Mfg. Co.](#), 250 U.S. 2, 39 S. Ct. 431, 63 L. Ed. 810 (1919).

The Full Faith and Credit Clause did not bar the application of the no-prejudice rule under New York common law to a claim of an insured municipality from California for coverage under a pollution and remediation legal liability insurance policy that specified the application of New York law, since the contractual choice-of-law clause had not been procured by fraud or overreaching; although the "notice-prejudice" rule applied in California, the court could not balance the interests of California against New York's interests. [Indian Harbor Ins. Co. v. City of San Diego](#), 972 F. Supp. 2d 634 (S.D. N.Y. 2013), judgment aff'd, 586 Fed. Appx. 726 (2d Cir. 2014).

16 [Watson v. Employers Liability Assur. Corp.](#), 348 U.S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954); [McNeal v. State Farm Mut. Auto. Ins. Co.](#), 278 So. 2d 108 (La. 1973).

17 [Order of United Commercial Travelers of America v. Wolfe](#), 331 U.S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687, 173 A.L.R. 1107 (1947); [Pink v. A.A.A. Highway Exp.](#), 314 U.S. 201, 62 S. Ct. 241, 86 L. Ed. 152, 137 A.L.R. 957 (1941); [Sovereign Camp, W.O.W. v. Bolin](#), 305 U.S. 66, 59 S. Ct. 35, 83 L. Ed. 45, 119 A.L.R. 478 (1938); [Modern Woodmen of America v. Mixer](#), 267 U.S. 544, 45 S. Ct. 389, 69 L. Ed. 783, 41 A.L.R. 1384 (1925); [Supreme Council of the Royal Arcanum v. Green](#), 237 U.S. 531, 35 S. Ct. 724, 59 L. Ed. 1089 (1915).

18 [E. C. Warner Co. v. W. B. Foshay Co.](#), 57 F.2d 656 (C.C.A. 8th Cir. 1932).

The Full Faith and Credit Clause did not prevent Pennsylvania from enforcing legislation designed to regulate, inter alia, the interest rate its residents had to pay on mail order installment sale contracts entered into between Pennsylvania residents and an Illinois corporation where there was no conflict between Illinois policy and Pennsylvania policy. [Aldens, Inc. v. Packel](#), 524 F.2d 38, 20 Fed. R. Serv. 2d 1173 (3d Cir. 1975).

19 [Olmsted v. Olmsted](#), 216 U.S. 386, 30 S. Ct. 292, 54 L. Ed. 530 (1910); [Pfeifer v. Wright](#), 41 F.2d 464, 73 A.L.R. 932 (C.C.A. 10th Cir. 1930); [In re Lund's Estate](#), 26 Cal. 2d 472, 159 P.2d 643, 162 A.L.R. 606 (1945).

20 [State v. Berringer](#), 234 Or. App. 665, 229 P.3d 615 (2010) (the California Compassionate Use Act (CCUA) did not, under the Full Faith and Credit Clause, preclude a California defendant's arrest and prosecution for marijuana possession in Oregon; the CCUA, by its terms, provided nothing more than a defense against the enforcement of certain California marijuana laws, and Oregon did not and could not enforce California's marijuana laws against the defendant).

21 [Martinez v. Borg](#), 937 F.2d 422 (9th Cir. 1991) (California state courts properly refused to give full faith and credit to a Colorado document declaring that the petitioner and a witness had a common-law marriage under Colorado law; the California courts properly applied Colorado law in considering all the relevant evidence of the couple's cohabitation and intent to hold themselves out as common-law spouses); [Henderson v. Henderson](#), 199 Md. 449, 87 A.2d 403 (1952).

The Defense of Marriage Act (DOMA), which permitted states to refuse to give full faith and credit to same-sex marriages performed in another state, was an appropriate exercise of Congressional power under the Full Faith and Credit Clause to regulate conflicts between the laws of two different states, and thus a same-sex couple could not challenge South Carolina's laws denying recognition of their valid marriage from the District of Columbia under the Full Faith and Credit Clause. [Bradacs v. Haley](#), 58 F. Supp. 3d 514 (D.S.C. 2014).

22 [Loughran v. Loughran](#), 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934); [Wheelock v. Freiwald](#), 66 F.2d 694 (C.C.A. 8th Cir. 1933); [Smith v. Goldsmith](#), 223 Ala. 155, 134 So. 651 (1931); [In re Ommang's Estate](#), 183 Minn. 92, 235 N.W. 529 (1931); [Wheelock v. Wheelock](#), 103 Vt. 417, 154 A. 665 (1931); [Wampler v. Wampler](#), 25 Wash. 2d 258, 170 P.2d 316 (1946).

23 [Ransom v. Marrese](#), 122 Ill. 2d 518, 120 Ill. Dec. 525, 524 N.E.2d 555 (1988).

24 [Crair v. Brookdale Hosp. Medical Center](#), 94 N.Y.2d 524, 707 N.Y.S.2d 375, 728 N.E.2d 974, 144 Ed. Law Rep. 612 (2000) (holding that neither the Full Faith and Credit Clause, nor any other provision of the Federal Constitution, required that New York apply Virginia and Maryland notice of claim provisions applicable to claims against entities of those states to claims brought against state universities of Virginia and Maryland, based on their roles in the manufacture and sale of allegedly contaminated human-growth hormone).

25 [Groseclose v. Plummer](#), 106 F.2d 311 (C.C.A. 9th Cir. 1939); [Yacovone v. Bolger](#), 645 F.2d 1028 (D.C. Cir. 1981).

26 [Goad v. Celotex Corp.](#), 831 F.2d 508 (4th Cir. 1987).

27 [Jackson v. Russell](#), 533 N.E.2d 153 (Ind. Ct. App. 1989).

28 In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation, 900 F. Supp. 2d 1055 (C.D. Cal.
2012).

29 Lozier v. State, 284 So. 3d 745 (Miss. 2019); In Interest of C.B., 2018 ND 27, 906 N.W.2d 93 (N.D. 2018).

30 Franchise Tax Bd. of California v. Hyatt, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016) (in a Nevada taxpayer's
suit against the Franchise Tax Board of California related to allegedly abusive audit and investigation
practices, the Nevada court applied a special and discriminatory rule, and thus violated the Full Faith and
Credit Clause, by awarding an amount which exceeded the maximum that could have been awarded in
similar circumstances against the Nevada agencies); *People of State of California ex rel. McColgan v. Bruce*,
129 F.2d 421, 147 A.L.R. 782 (C.C.A. 9th Cir. 1942); *Thomas v. Bridges*, 144 So. 3d 1001 (La. 2014); *City
of Philadelphia v. Austin*, 86 N.J. 55, 429 A.2d 568 (1981).

31 *Morrison v. Budget Rent A Car Systems, Inc.*, 230 A.D.2d 253, 657 N.Y.S.2d 721 (2d Dep't 1997).

32 *Cadorette v. U.S.*, 988 F.2d 215 (1st Cir. 1993); *Easter v. Ochs*, 837 S.W.2d 516 (Mo. 1992); *Schwal v.
Meyer*, 93 Misc. 2d 1051, 403 N.Y.S.2d 629 (Sur. Ct. 1978).

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16B Am. Jur. 2d Constitutional Law § 1023

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XV. Full Faith and Credit

A. In General

§ 1023. When federal question arises under Full Faith and Credit Clause

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West's Key Number Digest

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A question arising under the Full Faith and Credit Clause is a federal question,¹ and the Supreme Court of the United States is the final arbiter, for both state and federal courts,² when any question is raised as to what is a permissible limitation on such clause.³ However, in order to create a reviewable federal question under the constitutional provision as to full faith and credit, the fact that the validity of the laws of another state is drawn into question by the courts of a state determining rights arising under such laws of such other state, and not merely the construction of such laws, must be shown.⁴ Stated another way, full faith and credit are not denied to a statute of another state where a court does not deny its validity but only construes it.⁵ The requirement of full faith and credit permits a court of one state to construe the statutes of another state when the court is called upon to give such statutes the sanction of its process.⁶ A mere error of construction in a candid effort to construe the laws of another state is not a denial of full faith and credit.⁷ To constitute a violation of the Full Faith and Credit Clause, it is not enough that a state court misconstrue the law of another state; rather, the misconstruction must contradict the law of the other state that is clearly established and that has been brought to the court's attention.⁸

The Full Faith and Credit Clause does not require the courts of one state to follow the construction given by the courts of another state to its statutes,⁹ particularly where such construction would render the statute unconstitutional.¹⁰ On the other hand, in an action on a bond given pursuant to a foreign statute, that statute, as construed by the highest court of the state in which it was enacted, must be accorded the full faith and credit which is required by the Federal Constitution in respect of the public acts of a sister state.¹¹

Footnotes

- 1 [In re Hanrahan's Will](#), 109 Vt. 108, 194 A. 471 (1937).
- 2 [Johnson v. Muelberger](#), 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951); [Hutton v. Blackburn](#), 117 Misc. 434, 192 N.Y.S. 527 (Sup 1921).
- 3 [Williams v. State of North Carolina](#), 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942); [Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California](#), 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); [Marshall v. Marshall](#), 69 Cal. App. 2d 20, 157 P.2d 854 (3d Dist. 1945); [In re Holmes' Estate](#), 291 N.Y. 261, 52 N.E.2d 424, 150 A.L.R. 447 (1943).
- 4 [Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.](#), 243 U.S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1917); [Western Life Indemnity Co. of Illinois v. Rupp](#), 235 U.S. 261, 35 S. Ct. 37, 59 LED 220 (1914).
- 5 [Western Life Indemnity Co. of Illinois v. Rupp](#), 235 U.S. 261, 35 S. Ct. 37, 59 LED 220 (1914); [Smithsonian Institution v. St. John](#), 214 U.S. 19, 29 S. Ct. 601, 53 L. Ed. 892 (1909).
- 6 [Roseman v. Fidelity & Deposit Co. of Maryland](#), 154 Misc. 320, 277 N.Y.S. 471 (N.Y. City Ct. 1935).
Where a court construes a statute to place demands against an estate, founded upon a judgment, to refer only to domestic judgments, such construction does not violate the Full Faith and Credit Clause. [Cook's Estate v. Brown](#), 346 Mo. 281, 140 S.W.2d 42, 128 A.L.R. 1396 (1940).
- 7 [Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.](#), 243 U.S. 93, 37 S. Ct. 344, 61 L. Ed. 610 (1917).
- 8 [Sun Oil Co. v. Wortman](#), 486 U.S. 717, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988); [Sternberger v. Marathon Oil Co.](#), 257 Kan. 315, 894 P.2d 788 (1995).
- 9 [Nesbit v. Clark](#), 272 Pa. 161, 116 A. 404, 25 A.L.R. 1406 (1922).
Where only some rule of the common law of England is involved in determining rights governed by the law of another state where the common law prevails, construction of the common law given by the courts of the forum state will control, in preference to the construction given by the court of the state of contract. [Motz v. Alropa Corp.](#), 192 Ga. 176, 15 S.E.2d 237 (1941).
- 10 [Oxford v. St. Louis-San Francisco Ry. Co.](#), 331 Mo. 53, 52 S.W.2d 983 (1932).
- 11 [Graybar Elec. Co. v. New Amsterdam Cas. Co.](#), 292 N.Y. 246, 54 N.E.2d 811 (1944).

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XV. Full Faith and Credit

B. Operation and Effect of Provision

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16B Am. Jur. 2d Constitutional Law § 1024

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XV. Full Faith and Credit

B. Operation and Effect of Provision

§ 1024. Operation and effect of Full Faith and Credit Clause, generally; judgments

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West's Key Number Digest

West's Key Number Digest, [States](#) 5(2)

The Full Faith and Credit Clause which has been described as a nationally unifying force,¹ prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.² The Full Faith and Credit Clause applies to matters between states and to matters between a state and the federal government.³

The purpose of the Full Faith and Credit Clause is to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others.⁴ Accordingly, the Full Faith and Credit Clause demands that state-court judgments be accorded full effect in other States⁵ and precludes States from adopting any policy of hostility to the public Acts of other States.⁶ The Full Faith and Credit Clause requires each state to give effect to the official acts of other states and a judgment entered in one state must be respected in another, provided that the first state had jurisdiction over the parties and the subject matter.⁷ However, the Full Faith and Credit Clause requires, at most, that a state give effect to rights established between parties that arise from judgments, agreements, or statutes originating in other states⁸ and, therefore, is inapplicable to the enforcement of an out-of-state court's decision to issue a commission authorizing certain depositions and a demand for document production.⁹ Additionally, the Full Faith and Credit Clause is not implicated where the issue decided by a court in another state is different from the issue being decided by another state's court.¹⁰

Observation:

With respect to judgments, the full faith and credit obligation is exacting.¹¹

Federal courts are bound equally with state courts to observe the command of the Full Faith and Credit Clause where it is applicable.¹²

Full faith and credit is required by the Constitution only with respect to those public acts which are within the legislative jurisdiction of the enacting state.¹³

Full faith and credit does not mean that states must adopt the practices of other states regarding the time, manner, and mechanisms for enforcing judgments¹⁴

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Footnotes

- 1 [Magnolia Petroleum Co. v. Hunt](#), 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943); [Milwaukee County v. M.E. White Co.](#), 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935).
The Full Faith and Credit Clause expresses a unifying principle looking toward the maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states. [Hughes v. Fetter](#), 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951).
- 2 [State of Minnesota v. Northern Securities Co.](#), 194 U.S. 48, 24 S. Ct. 598, 48 L. Ed. 870 (1904).
- 3 [People v. Laino](#), 32 Cal. 4th 878, 11 Cal. Rptr. 3d 723, 87 P.3d 27 (2004); [In re Winston](#), 438 N.J. Super. 1, 101 A.3d 1120 (App. Div. 2014).
- 4 [Pink v. A.A.A. Highway Exp.](#), 314 U.S. 201, 62 S. Ct. 241, 86 L. Ed. 152, 137 A.L.R. 957 (1941); [Finstuen v. Crutcher](#), 496 F.3d 1139 (10th Cir. 2007); [Special Indem. Fund v. Bedford](#), 1993 OK 60, 852 P.2d 150 (Okla. 1993).
- 5 [Franchise Tax Board of California v. Hyatt](#), 139 S. Ct. 1485, 203 L. Ed. 2d 768 (2019).
The Full Faith and Credit Clause requires each state to recognize and give effect to valid judgments rendered by the courts of its sister states. [V.L. v. E.L.](#), 136 S. Ct. 1017, 194 L. Ed. 2d 92 (2016).
- 6 [Franchise Tax Board of California v. Hyatt](#), 139 S. Ct. 1485, 203 L. Ed. 2d 768 (2019); [Moran v. Wisconsin Department of Justice](#), 2019 WI App 38, 388 Wis. 2d 193, 932 N.W.2d 430 (Ct. App. 2019).
- 7 [Nevada v. Hall](#), 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979) (overruled on other grounds by, [Franchise Tax Board of California v. Hyatt](#), 139 S. Ct. 1485, 203 L. Ed. 2d 768 (2019)).
The full faith and credit command is exacting with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment. [Franchise Tax Bd. of California v. Hyatt](#), 538 U.S. 488, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003); [Baker by Thomas v. General Motors Corp.](#), 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); [Finstuen v. Crutcher](#), 496 F.3d 1139 (10th Cir. 2007); [In re Trust Created by Nixon](#), 277 Neb. 546, 763 N.W.2d 404 (2009).

A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. *EBF Partners, LLC v. Evolving Solutions Inc.*, 95 N.E.3d 145 (Ind. Ct. App. 2018).

8 State v. Berringer, 234 Or. App. 665, 229 P.3d 615 (2010).

9 In re Out-of-State subpoenas issued by New York Counsel for State of California Franchise Tax Bd., 33 Misc. 3d 500, 929 N.Y.S.2d 361 (Sup 2011), *aff'd*, 105 A.D.3d 186, 962 N.Y.S.2d 282 (2d Dep't 2013).

10 People v. Hlatky, 153 A.D.3d 1538, 61 N.Y.S.3d 395 (3d Dep't 2017).

11 V.L. v. E.L., 136 S. Ct. 1017, 194 L. Ed. 2d 92 (2016).

12 Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A.L.R. 696 (1932) (overruled in part on other grounds by, *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965)); *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82, 139 A.L.R. 1 (C.C.A. 3d Cir. 1941); *Botz v. Helvering*, 134 F.2d 538 (C.C.A. 8th Cir. 1943).

The full faith and credit rule was extended to all courts, federal as well as state. *Davis v. Davis*, 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A.L.R. 1518 (1938).

13 *Broderick v. Rosner*, 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A.L.R. 696 (1932) (overruled in part on other grounds by, *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965)); *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 30 N.E.2d 14 (1940).

14 *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

The full faith and credit clause does not mean that the forum state must follow the rendering state's mechanisms for enforcing judgments. *Boudette v. Boudette*, 2019 MT 268, 397 Mont. 519, 453 P.3d 893 (2019).

16B Am. Jur. 2d Constitutional Law § 1025

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XV. Full Faith and Credit

B. Operation and Effect of Provision

§ 1025. Attempts to evade applicability of Full Faith and Credit Clause

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West's Key Number Digest

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The Full Faith and Credit Clause, like other appropriate provisions of the Federal Constitution, limits the power of a state to determine the confines of the jurisdiction of its courts and the character of the controversies which shall be heard therein.¹ A state cannot escape its constitutional obligations under the clause by the simple device of denying jurisdiction to courts otherwise competent.² Also, a state may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the Full Faith and Credit Clause, where its courts have general jurisdiction of the subject matter and the parties.³

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Footnotes

- ¹ [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935).
- ² [Howlett By and Through Howlett v. Rose](#), 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990); [Hughes v. Fetter](#), 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951); [Angel v. Bullington](#), 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935).
- ³ [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); [Clark v. Williard](#), 294 U.S. 211, 55 S. Ct. 356, 79 L. Ed. 865, 98 A.L.R. 347 (1935); [Davis v. Amra Grotto M. O. V. P. E. R.](#), 169 Tenn. 564, 89 S.W.2d 754, 106 A.L.R. 1506 (1936).

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16B Am. Jur. 2d Constitutional Law § 1026

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XV. Full Faith and Credit

B. Operation and Effect of Provision

§ 1026. Applicability of Full Faith and Credit Clause to territories and Indian nations

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West's Key Number Digest, [States](#) 5(2)

By virtue of the act of Congress ([28 U.S.C.A. § 1738](#)) which gives force and effect to the Full Faith and Credit Clause, which act is in accordance with the mandates of [U.S. Const. Art. IV, § 1](#), the command of the clause is made applicable to the public acts, records, and judicial proceedings of territories as well as states.¹ Therefore, the Full Faith and Credit Clause is made applicable to territorial statutes with the same force and effect with which it applies to statutes of the various states.² Thus, the Full Faith and Credit Clause applies to the District of Columbia.³ For full faith and credit purposes, Puerto Rico is the functional equivalent of a state.⁴

There appears to be a difference of opinion as to whether an Indian tribe or nation is a "territory" whose laws are entitled to full faith and credit, with some authority holding full faith and credit applicable,⁵ and other authority holding to the contrary.⁶

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- ¹ [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- ² [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); [Atchison, T. & S.F. Ry. Co. v. Sowers](#), 213 U.S. 55, 29 S. Ct. 397, 53 L. Ed. 695 (1909).
- ³ [Consumers United Ins. Co. v. Smith](#), 644 A.2d 1328 (D.C. 1994).

Under the Full Faith and Credit Clause, all state and federal courts, territorial courts, and courts of the District of Columbia must recognize the validly rendered judgments of one another. [Matter of Proceeding for Support under Uniform Support of Dependents Law](#), 94 Misc. 2d 588, 405 N.Y.S.2d 225 (Fam. Ct. 1978).

4 [R.G. Financial Corp. v. Vergara-Nunez](#), 446 F.3d 178 (1st Cir. 2006).

5 [Jim v. CIT Financial Services Corp.](#), 1975-NMSC-019, 87 N.M. 362, 533 P.2d 751, 16 U.C.C. Rep. Serv. 1121 (1975) (laws of the Navajo tribe of Indians are entitled to full faith and credit, under [28 U.S.C.A. § 1738](#), in New Mexico courts because the Navajo Nation is a "territory" within the meaning of that statute).

6 [Brown v. Babbitt Ford, Inc.](#), 117 Ariz. 192, 571 P.2d 689, 23 U.C.C. Rep. Serv. 266 (Ct. App. Div. 1 1977) (full faith and credit does not require Arizona courts to give full faith and credit to an enactment of the Navajo Tribal Council because the word "territory," as used in [28 U.S.C.A. § 1738](#), was not intended to apply to Indian reservations).

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XV. Full Faith and Credit

C. Exceptions to Provision

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16B Am. Jur. 2d Constitutional Law § 1027

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XV. Full Faith and Credit

C. Exceptions to Provision

1. In General

§ 1027. Limited sovereign power of states

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West's Key Number Digest

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Some important exceptions contravene the letter of the constitutional provision as to full faith and credit and are permitted to do so, but only because they are deemed not to be within its spirit.¹ Subject to the restraint and limitations of the Federal Constitution, the states have all the sovereign powers of independent nations.² These limitations were imposed for the accomplishment of certain purposes; and in order to preserve harmony in the constitutional system, the limitations upon the powers of the states are themselves limited to a certain extent, or rather, certain things are deemed not to be within them.³ Local sovereignty over local questions and the requirement that each state give full faith and credit to the public acts, records, and judicial proceedings of every other state seem to have had for their purpose not the attainment of uniformity in laws but rather, the right of each state to have local and peculiar laws which all others should respect and enforce within certain limitations; and to enable it to make and enforce such laws as it desires, each state is permitted to retain such limited sovereign power.⁴

There is no exception to the full faith and credit statute (28 U.S.C.A. § 1738) that would allow landowners who have been required to litigate unripe takings claims in state court to avoid the preclusive effect of a final judgment of that state court, by reserving the right to advance federal takings claims that are not ripe until entry of a final state judgment denying just compensation.⁵

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Footnotes

- 1 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 2 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 3 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 4 Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); Olmsted v. Olmsted, 216 U.S. 386, 30 S. Ct. 292, 54 L. Ed. 530 (1910); Roller v. Murray, 71 W. Va. 161, 76 S.E. 172 (1912).
- 5 San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005).

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16B Am. Jur. 2d Constitutional Law § 1028

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XV. Full Faith and Credit

C. Exceptions to Provision

1. In General

§ 1028. Applicability of exceptions to specific statutory provisions or public acts

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[Validity, construction, and application of enactment, implementation, or repeal of formal educational requirement for admission to the bar, 44 A.L.R.4th 910](#)

Some questions have arisen as to what types of statutes or actions are subject to the Full Faith and Credit Clause; actions or determinations of a state's governor that he or she has jurisdiction to grant asylum to fugitives are not entitled to full faith and credit.¹ The acts of certain state commissions are not entitled to full faith and credit.²

Although it requires recognizing and honoring foreign judgments, the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state.³ Statutes of limitations and savings statutes are not sufficiently substantive to require that full faith and credit be applicable to them.⁴

The Full Faith and Credit Clause has nothing to do with the conduct of individuals or corporations⁵ and has no application to the laws of a foreign country.⁶

The Full Faith and Credit Clause does not reach the question of what effect federal entities must give to state pardons.⁷

The Full faith and Credit Clause does not require that sister states enforce a foreign penal judgment.⁸

The Full Faith and Credit Clause does not require the one state to substitute its weapons statutes for those of another state.⁹ With regard to the prosecution of an agent of another state's bail bondsman or bondswoman for unlawfully carrying a weapon while in the state to arrest a fugitive, the forum state is not required to give full faith and credit to the agent's out-of-state private investigator's license and the other state's laws regulating the same.¹⁰

The system of rules that a state court adopts to govern admission to the bar as a matter of local policy and assessments made by the courts of other states regarding the petitioner's legal training need not be extended full faith and credit.¹¹

The Constitution does not require that full faith and credit be given to a defendant's driver's license issued by another state, and possession of that driver's license does not entitle the defendant to drive upon another state's highways when the defendant's driving privilege has been revoked in the other state.¹²

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Footnotes

- 1 [State of Ala. ex rel. Governor and Atty. Gen. v. Engler](#), 85 F.3d 1205, 1996 FED App. 0164P (6th Cir. 1996).
- 2 [D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey](#), 535 N.W.2d 671 (Minn. Ct. App. 1995).
- 3 [Boudette v. Boudette](#), 2019 MT 268, 397 Mont. 519, 453 P.3d 893 (2019).
- 4 [Jamison v. Cooper](#), 754 F.2d 1568 (11th Cir. 1985); [Dart Industries, Inc. v. Adell Plastics, Inc.](#), 517 F. Supp. 9, 31 U.C.C. Rep. Serv. 1397 (S.D. Ind. 1980); [Armor v. Michelin Tire Corp.](#), 923 F. Supp. 103 (S.D. W. Va. 1996), order aff'd, 113 F.3d 1231 (4th Cir. 1997); [Eschenhagen v. Zika](#), 144 Ariz. 213, 696 P.2d 1362 (Ct. App. Div. 1 1985).
- 5 [State of Minnesota v. Northern Securities Co.](#), 194 U.S. 48, 24 S. Ct. 598, 48 L. Ed. 870 (1904).
- 6 [Stepp v. Employers' Liability Assur. Corp.](#), 30 F. Supp. 558 (N.D. Tex. 1939); [Clubb v. Clubb](#), 402 Ill. 390, 84 N.E.2d 366 (1949).
The Full Faith and Credit Clause of the United States Constitution does not apply to judgments of foreign countries. [Aleem v. Aleem](#), 404 Md. 404, 947 A.2d 489 (2008).
The Full Faith and Credit Clause of the Federal Constitution applies to sister states, not to foreign countries. [American Nonwovens, Inc. v. Non Wovens Engineering, S.R.L.](#), 648 So. 2d 565 (Ala. 1994).
- 7 [Yacovone v. Bolger](#), 645 F.2d 1028 (D.C. Cir. 1981).
- 8 [People v. Laino](#), 32 Cal. 4th 878, 11 Cal. Rptr. 3d 723, 87 P.3d 27 (2004) (holding that the Full Faith and Credit Clause does not preclude a state from determining under its own laws whether a guilty plea in another jurisdiction constitutes a prior conviction for purposes of its habitual criminal statute).
The question of whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state under the Full Faith and Credit Clause, depends upon the question whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act; in making this determination, a court should also consider whether the wrong to be discouraged by the statute is a wrong to the public or a wrong to the individual. [Enviropower, L.L.C. v. Bear, Stearns & Co., Inc.](#), 265 S.W.3d 16 (Tex. App. Houston 1st Dist. 2008).
- 9 [Commonwealth v. Harris](#), 481 Mass. 767, 119 N.E.3d 1158 (2019).
- 10 [Hawkins v. State](#), 745 S.W.2d 511 (Tex. App. Fort Worth 1988), petition for discretionary review refused, (Jan. 18, 1989).

- 11 [Matter of Tocci](#), 413 Mass. 542, 600 N.E.2d 577 (1992).
Retesting out-of-state attorneys did not violate the Full Faith and Credit Clause since no act, record, or judicial proceeding in the states in which the attorney had passed the bar stated that the applicant was entitled to practice law in California; a federal district court rule on the admission of attorneys to practice did not violate the full faith and credit by requiring out-of-state attorneys to be admitted to the state bar. [Giannini v. Real](#), 911 F.2d 354 (9th Cir. 1990).
- 12 [Rigney v. Edgar](#), 135 Ill. App. 3d 893, 90 Ill. Dec. 548, 482 N.E.2d 367 (1st Dist. 1985); [State v. Bray](#), 774 S.W.2d 555 (Mo. Ct. App. W.D. 1989).

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XV. Full Faith and Credit

C. Exceptions to Provision

2. Public Policy of Forum State

§ 1029. Public policy of forum state as affecting full faith and credit requirement, generally; violation or conflict with forum state public policy

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West's Key Number Digest

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As a general principle, local policy may not override the constitutional requirement of full faith and credit.¹ Thus, a valid judgment rendered in one state will be recognized and enforced in a sister state even though the strong public policy of the latter state would have precluded recovery in its courts on the original claim.² Still, there is room for some play of conflicting state policies in the effect and operation of the Full Faith and Credit Clause,³ although such room is narrow.⁴

It has thus often been recognized, as the most significant exception to the Full Faith and Credit Clause, that there are some limitations upon the extent to which a state will be required by that clause to enforce the judgments or acts of another state in contravention of its own statutes or policy.⁵ Therefore, the Full Faith and Credit Clause does not ordinarily require a state, with respect to persons and events within its borders, to substitute for its own law the conflicting law of another state, even though the latter law is of controlling force in the courts of the latter state with respect to the same persons and events,⁶ although the Full Faith and Credit Clause ought not lightly to be set aside.⁷ Under the Full Faith and Credit Clause, a state need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate,⁸ especially in cases where application of the clause would create an impasse which would leave a litigant remediless;⁹ full faith and credit principles allow each State to enforce its own statutory policy.¹⁰ However, a state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state.¹¹

Where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is even more apparent than in a case of the enforcement of foreign judgments.¹² A rigid and literal enforcement of the clause, without regard to the statutes of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of another but cannot be enforced in its own courts; unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that the Supreme Court must determine for itself the extent to which a statute of one state may qualify or deny rights asserted under the statute of another.¹³ Hence, the Full Faith and Credit Clause does not require the enforcement of every right conferred by a statute of another state.¹⁴ Nothing in the Federal Constitution ensures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances.¹⁵

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Footnotes

- 1 [Hirson v. United Stores Corp.](#), 263 A.D. 646, 34 N.Y.S.2d 122 (1st Dep't 1942), judgment aff'd, 289 N.Y. 564, 43 N.E.2d 712 (1942).
If in the application of the Full Faith and Credit Clause, local policy must at times be required to give way, such is part of the price of our federal system. [Finstuen v. Crutcher](#), 496 F.3d 1139 (10th Cir. 2007).
- 2 [Am. Jur. 2d, Judgments](#) § 730.
- 3 [Milwaukee County v. M.E. White Co.](#), 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935); [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
A court may be guided by the forum state's public policy in determining the law applicable to a controversy. [Baker by Thomas v. General Motors Corp.](#), 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998).
The Full Faith and Credit Clause is not an inexorable and unqualified command but leaves some scope for state control within its borders of affairs which are peculiarly its own. [Pink v. A.A.A. Highway Exp.](#), 314 U.S. 201, 62 S. Ct. 241, 86 L. Ed. 152, 137 A.L.R. 957 (1941).
- 4 [Milwaukee County v. M.E. White Co.](#), 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935); [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935).
There is no roving public policy exception to the full faith and credit due judgments. [Baker by Thomas v. General Motors Corp.](#), 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); [Finstuen v. Crutcher](#), 496 F.3d 1139 (10th Cir. 2007); [In re Trust Created by Nixon](#), 277 Neb. 546, 763 N.W.2d 404 (2009).
- 5 [Milwaukee County v. M.E. White Co.](#), 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935) (recognizing rule, but holding that a judgment for taxes is entitled to full faith and credit); [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); [Johnson v. Lincoln Square Properties, Inc.](#), 571 So. 2d 541 (Fla. 2d DCA 1990); [EBF Partners, LLC v. Evolving Solutions Inc.](#), 95 N.E.3d 145 (Ind. Ct. App. 2018) (the Full Faith and Credit Clause has some limitation, in that a forum state may consider its own public policy in determining the law applicable to a controversy); [State v. Pope](#), 23 Kan. App. 2d 69, 927 P.2d 503 (1996); [K.D.F. v. Rex](#), 878 S.W.2d 589 (Tex. 1994).
- 6 [Magnolia Petroleum Co. v. Hunt](#), 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943); [Williams v. State of North Carolina](#), 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942); [Griffin v. McCoach](#), 313 U.S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A.L.R. 1462 (1941); [Crofoot v. Harris](#), 239 Cal. App. 4th 1125, 192 Cal. Rptr. 3d 49 (2d Dist. 2015); [Miller v. Kingsley](#), 194 Neb. 123, 230 N.W.2d 472 (1975); [New York State Osteopathic Soc., Inc. v. Allen](#), 58 Misc. 2d 321, 295 N.Y.S.2d 134 (Sup 1967), judgment aff'd, 31 A.D.2d 111, 295 N.Y.S.2d 536 (3d Dep't 1968), order rev'd on other grounds, 26 N.Y.2d 20, 308 N.Y.S.2d 342, 256 N.E.2d 510 (1970); [Hawkins v. State](#), 745 S.W.2d 511 (Tex. App. Fort Worth 1988), petition for discretionary review refused, (Jan. 18, 1989).
The Full Faith and Credit Clause does not require a state to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy. [Franchise Tax Bd. of California v. Hyatt](#), 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016); [Oregon State University v. Superior](#)

Court, 16 Cal. App. 5th 1180, 225 Cal. Rptr. 3d 31, 349 Ed. Law Rep. 149 (4th Dist. 2017), review denied, (Feb. 21, 2018).

While a state can properly choose to create a business-friendly environment within its own boundaries, the federal Constitution does not require a state to substitute the conflicting statute of another state for its own laws that are applicable to persons and events within that state. *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 104 Fed. R. Serv. 3d 773 (9th Cir. 2019).

Brandon-Thomas v. Brandon-Thomas, 163 So. 3d 644 (Fla. 2d DCA 2015).

Franchise Tax Bd. of California v. Hyatt, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016); *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003); *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945); *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017); *Proctor v. Vishay Intertechnology, Inc.*, 213 Cal. App. 4th 1258, 152 Cal. Rptr. 3d 914 (6th Dist. 2013); *Markin v. Grohmann*, 153 Idaho 223, 280 P.3d 726 (2012); *P.I. & I. Motor Exp., Inc./For U, LLC v. Industrial Com'n*, 368 Ill. App. 3d 230, 306 Ill. Dec. 385, 857 N.E.2d 784 (5th Dist. 2006); *Bologna Bros. v. Morrissey*, 154 So. 2d 455 (La. Ct. App. 2d Cir. 1963), writ refused, 245 La. 56, 156 So. 2d 601 (1963); *Ensor v. Director of Revenue*, 410 S.W.3d 693 (Mo. Ct. App. W.D. 2013); *State v. Barrett*, 2015 MT 303, 381 Mont. 299, 358 P.3d 921 (2015); *In re Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009); *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d 402, 19 N.Y.S.3d 689 (Sup 2015); *Pennsylvania State Police v. Doe*, 217 A.3d 455 (Pa. Commw. Ct. 2016); *Greenwell v. Davis*, 180 S.W.3d 287 (Tex. App. Texarkana 2005).

State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945).

DeCrow v. North Dakota Workforce Safety & Insurance Fund, 864 F.3d 989 (8th Cir. 2017).

In re Trust Created by Nixon, 277 Neb. 546, 763 N.W.2d 404 (2009).

State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945); *Williams v. State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942); *Metropolitan Creditors Service v. Sadri*, 15 Cal. App. 4th 1821, 19 Cal. Rptr. 2d 646 (1st Dist. 1993).

Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935); *Alaska Packers Ass'n v. Industrial Acc. Com'n*, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

The constitutional requirement of full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for the Supreme Court to choose in each case between the competing public policies involved. *Hughes v. Fetter*, 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951).

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935); *Alaska Packers Ass'n v. Industrial Acc. Com'n*, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503 (1996); *Gaskins v. Gaskins*, 311 Ky. 59, 223 S.W.2d 374, 13 A.L.R.2d 970 (1949); *City of Philadelphia v. Cohen*, 11 N.Y.2d 401, 230 N.Y.S.2d 188, 184 N.E.2d 167 (1962).

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Yellow Cab Transit Co. v. Overcash*, 133 F.2d 228 (C.C.A. 8th Cir. 1942).

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16B Am. Jur. 2d Constitutional Law § 1030

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XV. Full Faith and Credit

C. Exceptions to Provision

2. Public Policy of Forum State

§ 1030. Determination as to which state's public policy prevails

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States ⚙️ 5\(2\)](#)

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[Res judicata or collateral estoppel effect, in state where real property is located, of foreign decree dealing with such property, 32 A.L.R.3d 1330](#)

Prima facie, every state is entitled to enforce in its own courts its own statutes, lawfully enacted, and one who challenges a state's right to do so because of the force given to a conflicting statute of another state by the Full Faith and Credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.¹ It follows, then that not every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, though given no extraterritorial effect in the state of the other.²

The test or controlling principle is that the interests of the forum and the other state must be weighed and balanced.³ If there exists in the state of the forum a statute or a public policy and the governmental interests of that state in the persons, property, or events

in the state involved in the litigation outweighs the governmental interests of the foreign state for whose statute recognition is sought, the refusal of the courts of the forum to give effect to the right under the foreign statute does not constitute a denial of full faith and credit to that statute.⁴ On the other hand, if the governmental interest of the state of the forum in the subject of the litigation is lacking or slight as compared with the governmental interest of the state for whose statute recognition is sought, the refusal of the courts of the forum to accord that recognition is a denial of full faith and credit.⁵ Where the governmental interests of the two jurisdictions are equally balanced, and the statute of each properly extends over the event or transaction because of the connection with that state of one or more of the elements of the event or transaction, the forum may give effect to its own statute although in conflict with the statute of the other state in which some of the other elements of the transaction are located, and the latter state in turn may do likewise if the action is brought in its courts.⁶

In determining whether the statute of a state under which foreign rights arose or the law of the forum should control in matters involving policy and conflicting interests, the rule is fairly well settled that different considerations usually apply where the statute creating a foreign right, which it is claimed should be given effect, is set up by way of defense to an asserted liability, from those where merely affirmative rights are claimed under a foreign statute; upon several occasions the Supreme Court has held, that under the Full Faith and Credit Clause, one state cannot refuse to give effect to a substantive defense arising under applicable statutes of another state if failure to sanction the defense thus created by the statute of such other state subjects the defendant to irremediable liability.⁷ The Supreme Court has pointed out, however, that the necessity of balancing the interests of the forum and of the foreign state, the statute of which is asserted to control is not any the less whether the statute and policy of the forum are set up as a defense to a suit brought under a foreign statute or a foreign statute, is set up as a defense to a suit or proceeding under the local statute.⁸ In either case, the conflict is the same and in each, rights claimed under one statute prevail only by denying effect to the other.⁹ In both, the conflict is to be resolved not by giving automatic effect to the Full Faith and Credit Clause, compelling the courts of each state to subordinate its statutes to those of the other but by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight.¹⁰

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Footnotes

- 1 [State Farm Mut. Auto. Ins. Co. v. Duel](#), 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812 (1945); [Williams v. State of North Carolina](#), 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942); [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 2 [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); [Bradford Elec. Light Co. v. Clapper](#), 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A.L.R. 696 (1932) (overruled in part on other grounds by, [Crider v. Zurich Ins. Co.](#), 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965)).
- 3 [Pink v. A.A.A. Highway Exp.](#), 314 U.S. 201, 62 S. Ct. 241, 86 L. Ed. 152, 137 A.L.R. 957 (1941).
- 4 [Griffin v. McCoach](#), 313 U.S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A.L.R. 1462 (1941); [Alaska Packers Ass'n v. Industrial Acc. Com'n](#), 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935); [Clark v. Williard](#), 294 U.S. 211, 55 S. Ct. 356, 79 L. Ed. 865, 98 A.L.R. 347 (1935); [State ex rel. Weaver v. Missouri Workmen's Compensation Commission](#), 339 Mo. 150, 95 S.W.2d 641 (1936).
The Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy. [People ex rel. DuFauchard v. U.S. Financial Management, Inc.](#), 169 Cal. App. 4th 1502, 87 Cal. Rptr. 3d 615 (4th Dist. 2009); [Athay v. Stacey](#), 146 Idaho 407, 196 P.3d 325 (2008); [Caimares v. Erickson](#), 173 A.D.3d 417, 103 N.Y.S.3d 36 (1st Dep't 2019).
- 5 [John Hancock Mut. Life Ins. Co. v. Yates](#), 299 U.S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936); [Broderick v. Rosner](#), 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A.L.R. 1133 (1935); [Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.](#), 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934); [Fidelity-Phenix Fire Ins. Co. of New York v. Cortez Cigar Co.](#), 92 F.2d 882 (C.C.A. 5th Cir. 1937).
- 6 [Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California](#), 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939).

- 7 John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936).
- 8 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 9 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).
- 10 Alaska Packers Ass'n v. Industrial Acc. Com'n, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

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16B Am. Jur. 2d Constitutional Law § 1031

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

XV. Full Faith and Credit

C. Exceptions to Provision

2. Public Policy of Forum State

§ 1031. Application of public policy exception to Full Faith and Credit Clause to particular statutes and judgments

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The Full Faith and Credit Clause does not require a state to apply a second state's sovereign immunity statutes where such application would violate the first state's own legitimate public policy.¹ However, there are no considerations of local policy or law which could rightly be deemed to impair the force and effect which the Full Faith and Credit Clause and the Act of Congress (28 U.S.C.A. § 1738) require to be given to a money judgment outside the state of its rendition.²

The Full Faith and Credit Clause of the U.S. Constitution does not require a state to subordinate its own workers' compensation policies to those of another state.³

Even if one state's order indicated an intention to enjoin actions against an insolvent risk retention group's insureds, the order was not entitled to Full Faith and Credit or comity, and thus a stay in nursing home resident's negligence action in another state against the insured nursing home was not warranted; risk retention groups were not required to contribute to a guaranty fund in case of their insolvency and enforcing the stay, of potentially indefinite duration, would undermine the other state's important public policy of protecting victims of negligence in nursing homes and allowing them economic redress.⁴

Applying one state's Tort Claims Act's claims notice provision in negligence action against that state's university by the other state's employee, who was allegedly injured when loading a container owned by university onto vessel in the other state, would not conflict with or violate the other state's public policy, as would support determination that the state act was entitled to full

faith and credit in employee's action, even though the other state was competent to legislate on subject matter of personal injury within the state and had sufficient contacts to apply its substantive law; both states' acts had similar claims notice provisions, served similar purposes, functioned similarly, and applied to public universities.⁵

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Footnotes

- 1 [Franchise Tax Bd. of California v. Hyatt](#), 538 U.S. 488, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003).
The Full Faith and Credit Clause does not require a state to apply foreign statutes that conditionally waive sovereign immunity, particularly when the foreign statute would produce a result in violation of the forum state's own legitimate public policy. [Greenwell v. Davis](#), 180 S.W.3d 287 (Tex. App. Texarkana 2005).
- 2 [Baker by Thomas v. General Motors Corp.](#), 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998).
- 3 [Watt v. W.C.A.B. \(Boyd Bros. Transp.\)](#), 123 A.3d 1155 (Pa. Commw. Ct. 2015).
A North Dakota law which suspended a provision of workers' compensation benefits pending resolution of an application for workers' compensation benefits in another state for the same injury did not violate North Dakota's constitutional obligation to provide full faith and credit to another states provision of workers' compensation death benefits, as a state need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it was competent to legislate. [DeCrow v. North Dakota Workforce Safety & Insurance Fund](#), 864 F.3d 989 (8th Cir. 2017).
- 4 [Givens v. Kingsbridge Heights Care Center, Inc.](#), 171 A.D.3d 569, 98 N.Y.S.3d 176 (1st Dep't 2019).
- 5 [Oregon State University v. Superior Court](#), 16 Cal. App. 5th 1180, 225 Cal. Rptr. 3d 31, 349 Ed. Law Rep. 149 (4th Dist. 2017), review denied, (Feb. 21, 2018).

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